TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 261.

ST. LOUIS AND KANSAS CITY LAND COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL., PLAINTIFFS IN ERROR,

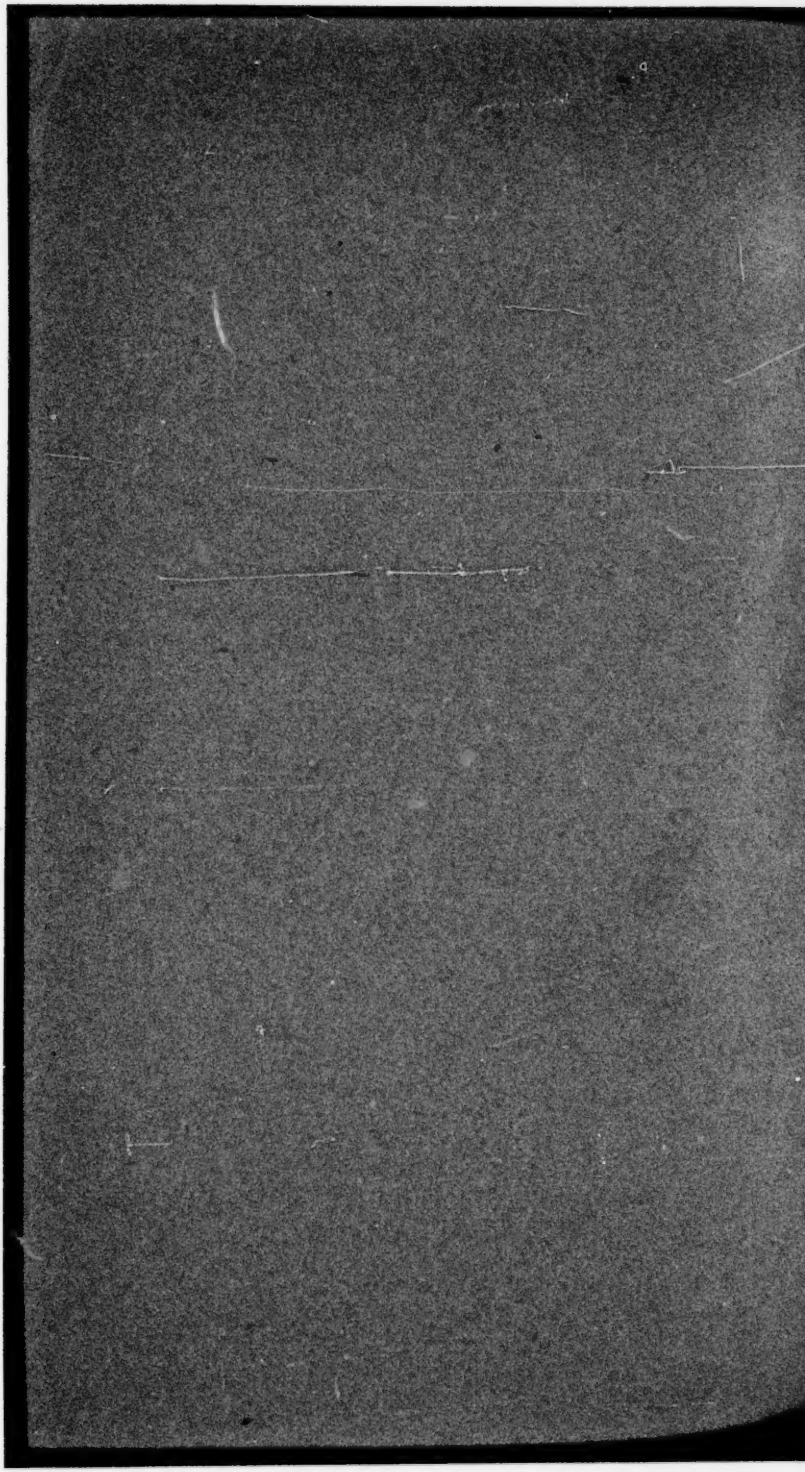
vs.

KANSAS CITY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED OCTOBER 10, 1914.

(24,400)



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a In the Supreme Court of the State of Missouri.

No. 18080.

ST. LOUIS & KANSAS CITY LAND CO., Appellants,

vs.

KANSAS CITY, Respondent.

Stipulation.

It is hereby stipulated and agreed that the following record, containing copy of petition for writ of error, assignment of errors, bond, writ of error, citation, order allowing writ of error, and the following pages of the printed abstract of record, heretofore filed in the Supreme Court by appellants, to-wit:—Pages 1 to 79, inclusive, Pages 98 to 129, inclusive, Pages 132 and 133, Pages 140 to 145, inclusive, Pages 174 to 268, inclusive, also additional abstract of record filed by the Union Depot Bridge & Terminal Railroad Company consisting of twenty pages, and hereto attached, may be printed as the abstract of record to be sent to the Clerk of the Supreme Court of the United States by the Clerk of the Supreme Court of the State of Missouri on the writ of error heretofore allowed herein; and it is further agreed that the Clerk of the Supreme Court may make copies of all record entries in the Supreme Court in said cause, including the judgment of the Circuit Court and order allowing appeal to the Supreme Court, the opinion of the Supreme Court affirming the judgment, and the judgment and opinion of the Supreme Court entered thereon; and it is further agreed that the Clerk of the Supreme Court of Mo. need copy no other paper or papers for transmission to the Supreme Court of the United States other than those specified in this stipulation. Dated at Kansas City this 21st day of September, 1914.

ST. LOUIS & KANSAS CITY LAND CO.
ET AL.,
By I. N. WATSON,
Attorney for All Appellants in Above Cause.
I. N. WATSON, *Att'y for Appellants.*
A. F. EVANS AND
J. C. PETHERBRIDGE,
Attorneys for Respondent.

[Endorsed:] No. 18080. St. Louis & Kansas City Land Co., et al., Appellants, vs. Kansas City, Respondent. Stipulation. Filed Sep. 23, 1914. J. D. Allen, clerk.

1 In the Supreme Court of the United States, October Term, 1914.

No. —.

ST. LOUIS & KANSAS CITY LAND COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; Chicago, Rock Island & Pacific Railway Company; Union Pacific Railroad Company; Union Depot Bridge & Terminal Railroad Company; Edgewater Terminal Railway Company; Missouri Pacific Railway Company; Federal Investment Company; Kansas City, St. Louis & Chicago Railroad Company; The Chicago & Alton Railroad Company; State Line Improvement Company; Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company, Plaintiffs in Error,

vs.

KANAS CITY, Defendant in Error.

Petition for Writ of Error.

To the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

The petition of St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Union Depot Bridge & Terminal Railroad Company, Edgewater Terminal Railway Company, Missouri Pacific Railway Company, Federal Investment Company, Kansas City, St. Louis & Chicago Railroad Com-Company, The Chicago & Alton Railroad Company, State Line Improvement Company, Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company, who reside or do business in the city of Kansas City, Jackson County, Missouri, respectfully show that, on or about October 19, 1909, Kansas City, in pursuance of Section 2 of Article 6, of the charter of Kansas City, Missouri, passed an ordinance which is numbered 3209, and entitled

2 "An ordinance to open and widen Sixth Street from the East line of Bluff Street to the West line of Broadway, and repealing Ordinance No. 1750 entitled 'An Ordinance to open and widen Sixth Street from the East line of Bluff Street to the West line of Broadway, approved July 14, 1909' "; that the said ordinance was duly passed in accordance with Article 6 of the charter of Kansas City, Missouri; and your petitioners further allege in their petition that no notice was given of the said proceedings, as required by Section 2 or Article 6 of the charter of Kansas City, Missouri; and that a jury was empanelled under Ordinance No. 3209, and assessed damages to the property taken at the sum of $166,299.57, and benefits of a like amount to pay for the same; that no notice as required by the charter of Kansas City, Missouri, was given

your petitioners herein, and no appearance was made by them in said suit to condemn said lands aforesaid; that, under Ordinance No. 3209, the jury assessed against the appellants, who are petitioners for writ of error herein, benefits in excess of the sum of $30,000.00, and no appearance was made by said appellants and petitioners for writ of error, and no appeal was taken from the judgment of the Municipal Court of Kansas City, Missouri; that, thereafter, certain proceedings were instituted in the Circuit Court of Jackson County, Missouri, to enjoin the collection of said benefits assessed against the property of the petitioners for writ of error herein, and, upon final hearing of said cause, the Circuit Court of Jackson County, Missouri, sustained the judgment enjoining the collection of said assessments upon the ground that the same were illegal for the want of any notice having been given, as required by Section 2 of Article 6 of the charter of Kansas City, Missouri; that, thereafter, the city of Kansas City instituted supplemental proceedings under Section 23, of Article 6, of the charter of Kansas City, Missouri, which said ordinance was numbered 7539 and provided for "authorizing and directing the institution, carrying on and maintaining of supple-
3 mental proceedings to properly assess benefits against certain pieces and parcels of land included within the benefit district described by Ordinance 3209, approved October 19, 1909"; that, in and by said supplemental proceedings, the trial court denied to the petitioners for writ of error herein the right to be heard upon the question of the amount of damages, which your petitioners claimed is given them under and by virtue of Sections 2, 3, and 6, of article 6 of the charter of Kansas City, Missouri, which provide:

(Section 2) "The court shall thereupon, by order appoint a day and place for empanelling a jury to ascertain the compensation for the property to be taken or damaged, and to make assessments to pay for the same, which order shall recite the number and title of said ordinance, with the date when it took effect, and contain a description of the property proposed to be taken or damaged, as contained in said ordinance; and also a description of the property contained in the benefit district, as described in said ordinance, and naming the day and place fixed by the said court for empanelling a jury to ascertain the compensation for property to be taken or damaged, and to make the assessments to pay for the same; and which order shall be directed to all persons to whom it may concern, without naming them. A copy of such order shall be published in a newspaper at the time doing the city printing for four successive weeks, the last insertion to be not more than one week prior to the day set for said hearing."

(Section 3) "Parties interested may submit evidence to the jury, and the latter shall examine personally the property to be taken, damaged, and assessed."

(Section 6) "In case the city, or any person affected by the proceedings, either as the owner thereof, or interested in any of the property taken or damaged, or as the owner, or interested in any of the property assessed, shall feel aggrieved by the verdict of the jury, such party so aggrieved may, within twenty days from the

time the verdict is affirmed, appeal to the Circuit Court of Jackson County, Missouri, at Kansas City, and * * * thereupon the said Circuit Court shall become possessed of the cause, and said cause, unless dismissed, shall be tried de novo in said Circuit Court and have precedence over all other causes for trial."

And your petitioners further allege that, in and by virtue of the city failing to give the required notice required by Section 2 of Article 6, of the charter of Kansas City, Missouri, aforesaid, and by failing, in the supplemental proceedings, to permit the petitioners herein, to show the amount of damages accruing to the property owners whose property was proposed to be taken for the
4 widening of Sixth Street, the court deprived your petitioners herein of their property without due process of law, and denied to your petitioners the equal protection of the law, which is given them under and by virtue of the 14th Amendment to the Constitution of the United States.

And your petitioners further allege that, in and by said proceedings, the trial court deprived the appellants of their property without due process of law, and denied to your petitioners for writ of error, the equal protection of the law, in violation of the 14th Amendment to the Constitution of the United States; and your petitioners further allege that the said Ordinance No. 3209 was insufficient upon its face to give jurisdiction to the court, and that the said court was without authority to hear and determine such questions because the Constitution of the State of Missouri did not confer judicial authority upon the Municipal Court of Kansas City for hearing such proceedings; and your petitioners further aver that one of their defense to said proceedings in the trial court, was that the supplemental ordinance No. 7539 did not specify any specific error, omission or defect sought to be remedied, or what omission was sought to be corrected, neither does it specify the property to be taken, or what property in the benefit district has been omitted to be assessed, and said ordinance was therefore void on its face and did not give jurisdiction to the said Municipal Court of Kansas City, Missouri, and was such that it did not constitute due process of law and did not advise the petitioners for said writ of error what property was omitted to be assessed, or what property would be assessed in said supplemental proceedings, and therefore, the said ordinance was insufficient to give any notice of such proceedings such as is required by the term "due process of law" guaranteed to said parties under the 14th Amendment to the Constitution of the United States.

And your petitioners further allege in their defense to said proceedings that a suit was brought in the Circuit Court of Jackson County, Missouri, wherein the Union Pacific Railroad Com-
5 pany, and others were plaintiffs, and Kansas City was defendant, in which the court was asked to enjoin the city of Kansas City from the collection of any tax or any benefit assessed under the proceedings under Ordinance No. 3209; that, upon said hearing January 23, 1911, the court adjudged the proceedings under Ordinance No. 3209 null and void for want of notice, and enjoined

the city from collecting any assessment thereunder; and that it was further alleged as a defense in this case that said proceedings could not be supplemented without violating the constitutional provision guaranteeing due process of law, and that, in and by such supplemental proceedings, the court was permitting the city of Kansas City to violate the plain terms and provisions of the charter and take from your petitioners herein the right to be heard on the question of damages to be awarded to the property owners whose property was to be taken for the proposed widening of Sixth Street, as aforesaid, which hearing was given them under and by virtue of Sections 2, 3 and 6, of Article 6, of the charter of Kansas City aforesaid, and thus, in denying the right of your petitioners to such hearing, the court denied to the parties in the benefit district due process of law guaranteed to them by virtue of the 14th Amendment to the Constitution of the United States; and your petitioners then and there invoked the protection of the 14th Amendment to the Constitution of the United States as a defense against the proceedings in said supplemental proceeding.

And your petitioners further allege that, in the answer of the Union Depot Bridge & Terminal Railroad Company, it alleged that it had appeared under the proceedings under Ordinace No. 3209 and had paid all the assessments against its property in said district under Ordinance No. 3209, and that, thereafter, no notice of any kind or character was given it that it would be re-assessed again for benefits under said supplemental ordinance No. 7539, and that the said proceedings under Ordinance No. 7539 were insufficient to constitute any notice of such proceedings to said Union Depot Bridge & Terminal Railroad Company, and that the said Union Depot Bridge & Ter-
6 minal Railroad Company made no appearance in said supplemental proceedings, did not know its property would be assessed, and it had no knowledge of any assessment until after the verdict was returned herein; that, in and by such proceedings, the trial court denied said defendant Union Depot Bridge & Terminal Railroad Company a hearing notice, and that the said proceedings were not sufficient notice to constitute due process of law required by the 14th Amendment to the Constitution of the United States; and the said Union Depot Bridge & Terminal Railroad Company, in its motion for new trial, alleged that it invoked the protection of the 14th Amendment to the Constitution of the United States against the proceedings therein under Ordinance No. 7539, and also of provisions of the second clause of the VII amendment and, in and by the petition for writ of error, your petitioners allege that there was drawn in question the validity of the proceedings under and by virtue of the Constitution of the United States guaranteeing due process of law, and that your said petitioners invoked the protection of the 14th Amendment to the Constitution of the United States as a defense to the proceedings herein, claiming that the said proceedings did not constitute due process of law required by the 14th Amendment to the Constitution of the United States, and that the decision in the trial court was in favor of the validity of the proceedings under Ordinance

No. 7539 wherein was drawn in question a right given under and by virtue of the Constitution of the United States, and the decision was against the right, privilege, and immunity especially set up and claimed under the 14th Amendment to the said Constitution of the United States, and a manifest error hath happened to the great damage of your petitioners St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Edgewater Terminal Railway Company, Missouri Pacific Railway Company, Federal Investment Company, Kansas City, St. Louis & Chicago Railroad Company, The Chicago & Alton Railroad Company,
7 State Line Improvement Company, Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company, and Union Depot Bridge and Terminal Railroad Company as by their complaint appears.

And your petitioners further allege that, upon said trial in the said Circuit Court of Jackson County, Missouri, and upon said subsequent motions made in said court, and also before the Supreme Court of the State of Missouri, your petitioners duly argued, insisted and asked that the said proceedings should be dismissed upon the ground that said proceedings did not constitute due process of law for want of the proper notice required by Sections 2, 3 and 6, of Article 6, of the charter of Kansas City, Missouri; and that the said supplemental proceedings were insufficient in law to constitute due process of law, and that said objections made by your petitioners were overruled in all said courts, and exceptions duly saved by your petitioners; and that your petitioners argued in said Supreme Court of the State of Missouri, before the judges of said Supreme Court, the question of the want of notice, and the validity of the notice given under Ordinance No. 3209, as well as under Supplemental Ordinance No. 7539, that the said proceedings and notice did not constitute due process of law, and that said decisions of said courts, and judges thereof, and each of them, denied to your petitioners a title, right, privilege and immunity held by your petitioners under the Constitution of the United States.

Wherefore, your petitioners pray that a writ of error may issue, and that they may be allowed to bring up for review before the Supreme Court of the United States, the said order and judgment of the said Supreme Court of the State of Missouri; and that your petitioners may have such other and further relief in the premises as may be just. And your petitioners will forever pray.

ST. LOUIS & KANSAS CITY LAND COMPANY AND
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.
By WARNER, DEAN, McLEOD & LANGWORTHY, *Their Attorneys.*
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
By PAUL E. WALKER, *Its Attorneys.*

8 UNION PACIFIC RAILROAD COMPANY,
By R. W. BLAIR & WATSON, WATSON & ALFORD, *Its Attorneys.*
UNION DEPOT BRIDGE & TERMINAL RAILROAD COMPANY,
By KENNETH McC. DEWEESE, *Its Attorney.*
EDGEWATER TERMINAL RAILWAY COMPANY AND
MISSOURI PACIFIC RAILWAY COMPANY,
By EDW. J. WHITE, *Their Attorney.*
FEDERAL INVESTMENT COMPANY,
By BALL & RYLAND, *Its Attorneys.*
KANSAS CITY, ST. LOUIS & CHICAGO RAILROAD COMPANY AND
THE CHICAGO & ALTON RAILROAD COMPANY,
By SCARRITT, SCARRITT, JONES & MILLER, *Their Attorneys.*
STATE LINE IMPROVEMENT COMPANY,
KANSAS CITY STOCK YARDS COMPANY, AND
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,
By COWHERD, INGRAHAM, DURHAM & MORSE, *Their Attorneys.*

8½ [Endorsed:] No. 18080. St. Louis & Kansas City Land Co., et al., Plaintiffs in Error, vs. Kansas City, Defendant in Error. Petition for Writ of Error. Allowed Aug. 14/14. Henry Lamm, Chief Justice. Filed Aug. 14, 1914. J. D. Allen, Clerk.

9 In the Supreme Court of the United States, October Term, 1914.

No. —.

ST. LOUIS & KANSAS CITY LAND COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; Chicago, Rock Island & Pacific Railway Company; Union Pacific Railroad Company; Union Depot Bridge & Terminal Railroad Company; Edgewater Terminal Railway Company; Missouri Pacific Railway Company; Federal Investment Company; Kansas City, St. Louis & Chicago Railroad Company; The Chicago & Alton Railroad Company; State Line Improvement Company; Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company, Plaintiffs in Error,

vs.

KANSAS CITY, Defendant in Error.

Assignments of Error.

Now come St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island &

Pacific Railway Company, Union Pacific Railroad Company, Union Depot Bridge & Terminal Railroad Company, Edgewater Terminal Railway Company, Missouri Pacific Railway Company, Federal Investment Company, Kansas City, St. Louis & Chicago Railroad Company, The Chicago & Alton Railroad Company, State Line Improvement Company, Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company, plaintiffs in error, and make and file this, their assignments of error, as follows:

(1) The Supreme Court of the State of Missouri erred in holding that plaintiffs in error were not entitled to a hearing on the amount of damages under the provisions of Sections 2, 3, and 6, of Article 6, of the charter of Kansas City, Missouri; and that, in and by such ruling, the plaintiffs in error herein were deprived of property without due process of law, and denied the equal protection of the law, in violation of the 14th Amendment to the Constitution
10 of the United States, in this, that due process of law requires notice before hearing, and an opportunity to be heard, and that, by Section 2 of Article 6, of the charter of Kansas City, Missouri, it is provided that the court shall make an order, appoint a day and place, for impanelling a jury to ascertain the compensation for property to be taken or damaged, and to make assessments to pay for the same, which order shall recite the number and title of said ordinance, with the date when it took effect, and contain a description of the property proposed to be taken or damaged, and also a description of the property contained in the benefit district, as described in said ordinance, and name the day and place fixed by the said court for impanelling a jury to ascertain the compensation for property taken or damaged, and to make assessments to pay for the same, and that a copy of such order shall be published in the newspaper at the time doing the city printing, for four successive weeks, the last insertion to be not more than one week prior to the day set for said hearing, and that no notice of said proceedings shall, in any case, be necessary to the validity thereof, except the publication of the order as herein provided. Notice so given by publication, shall be sufficient to authorize the court to hear and determine the cause, and make any finding or order, or render any judgment therein, etc. And by Section 3 of said article, the right to a hearing is given as follows: "Parties interested may submit evidence to the jury, and the latter shall examine the property to be taken, damaged, and assessed." And by Section 6 of said article, the owner interested in any of the property taken or damaged, or the owner of any property assessed benefits, who shall feel aggrieved by the verdict of the jury, may, within twenty days from the time the judgment is confirmed, appeal to the Circuit Court of Jackson County, Missouri, at Kansas City, where the case shall be tried de novo in said circuit court; and that, in and by the original proceedings under ordinance No. 3209, no valid and sufficient notice was given, as required by said section 2, which fact
11 was found by the Circuit Court of Jackson County, Missouri, in a proceeding to enjoin the collection of the benefit assessed against the property of the plaintiffs in error herein, and no

notice was given to the property owners whose property was assessed for benefits in the district, as required by Section 2, of Article 6, of the charter of Kansas City, Missouri, aforesaid; and that, in and by such proceedings, the said plaintiffs in error were denied a right to a hearing on the question of the amount of damages, and were denied the right of taking an appeal to the Circuit Court of Jackson County, Missouri, and having the same tried de novo; and that, in and by such proceedings, the court has denied to these plaintiffs in error, the right to a notice provided by said charter aforesaid; and in and by such proceedings, the trial court, and the Supreme Court of the State of Missouri, denied to the plaintiffs in error due process of law, and denied to them the equal protection of the law, in violation of the Constitution of the United States, in this, that they have been assessed benefits without any hearing, or an opportunity to be heard upon the amount of damages for property taken, and the amounts to be assessed against them as benefits to pay for the same; and that, in and by such proceedings, there was a want of notice, and that such proceedings, without such notice, did not constitute due process of law, provided for by the 14th Amendment to the Constitution of the United States; and that said decisions of the Supreme Court of the State of Missouri denied to plaintiffs in error, a title, right, privilege and immunity held by the plaintiffs in error under the Constitution and statutes of the United States; and that the Supreme Court of the State of Missouri decided against such right, title, privilege and immunity, to the manifest injury of the plaintiffs in error herein.

(2) The Supreme Court of the State of Missouri erred in holding that the city had a right under the so-called supplemental proceedings held under Ordinance No. 7539, to assess property
12 with benefits without the property being described in said ordinance, which it was claimed were not properly assessed, and which was omitted to be assessed, or wrongfully assessed, in the original proceedings; and in holding that Section 23 *or* Article 6, of the charter of Kansas City, Missouri, warranted assessing benefits in such supplemental proceedings against the plaintiffs in error herein without awarding them a right to be heard on the amount of damages in the Municipal Court, deprived the plaintiffs in error of their property without due process of law, and denied to them the equal protection of the law, in violation of the 14th Amendment to the Constitution of the United States; and that the plaintiffs in error herein claimed said right, privilege, and immunity in the trial court, and in the Supreme Court of the State of Missouri, but the decision of the trial court and the decision of the Supreme Court of the State of Missouri was against said right, title, privilege and immunity so held by your petitioners under the Constitution and statutes of the United States, and herein the court erred to the manifest injury of the plaintiffs in error herein.

(3) The Supreme Court of the State of Missouri erred in holding that as to the Union Depot Bridge and Terminal Railroad Company, the said supplemental proceedings were sufficient to give the court jurisdiction of said company to assess the benefits, notwithstanding

that benefits had been assessed under Ordinance No. 3209 and had been paid by said company, and that, in so holding, the trial court and the Supreme Court of the State of Missouri deprived said Union Depot Bridge & Terminal Railroad Company of its property without due process of law, in that the said proceedings were not sufficient to give any notice to the said Union Depot Bridge & Terminal Railroad Company that its property would again be assessed in said proceedings, for, upon the face of the record, it had already been assessed under Ordinance No. 3209, and had paid said assessments, as shown by the records, and it was not named in the supplemental proceedings, and said supplemental proceedings were intended to be brought for one purpose only—to correct errors
13 and omissions made in the previous assessment under Ordinance No. 3209, which had been held invalid, and that there was nothing in said supplemental proceedings notifying the said Union Depot Bridge & Terminal Railroad Company, that its property would again be assessed, and that the court, in so holding such proceedings to be sufficient, denied to the said Union Depot Bridge & Terminal Railroad Company due process of law guaranteed by the 14th Amendment to the Constitution of the United States; and that such right, privilege and immunity was claimed in the Supreme Court of the State of Missouri, and the decision of that court was against such right, privilege and immunity guaranteed by the Constitution of the United States, and herein the Supreme Court of the State of Missouri erred to the manifest injury of the plaintiffs in error herein.

(4) The Supreme Court of the State of Missouri erred in holding that Section 23, of Article 6, of the charter of Kansas City, Missouri, authorized and permitted, under the so-called supplemental proceedings under Ordinance No. 7539, benefits to be assessed against persons who had never been made parties to the first proceeding, and who had not been served with the notice required by Section 2, of said Article 6, so as to give the court jurisdiction over the said parties, and over their property; and that, in and by such proceedings, as shown of record, no jurisdiction was acquired over the plaintiffs in error herein under the proceedings held under Ordinance No. 3209, and, therefore, there was nothing that could be supplemented, and that, to give Section 23, of Article 6, of the charter of Kansas City, Missouri, such construction, violates the provisions of the 14th Amendment to the Constitution of the United States, in this, that it takes the property of the plaintiffs in error without due process of law, and denies them a hearing in court which is authorized and provided for by Section 2, of Article 6, of the charter of Kansas City, Missouri, aforesaid; and that, in and by such construction of said section, it permits the said Kansas City to violate the terms of Section 2, of Article 6, of its charter, and take from the plaintiffs in error herein the right to be heard under the original pro-
14 ceedings under Ordinance No. 3209, and to offer testimony as to the amount of damages and the benefits to be assessed against the property of the plaintiffs in error in said district; and that such construction permits the city to take advantage of its own

wrong and thereby deprive the plaintiffs in error herein of a hearing given by Section 2, of said article, and cutting them off from a right of a trial by the jury and the right to be heard and a right to offer proof as to the amount of damages to property to be taken, and deprives appellants of a right of trial by a jury of the amount of benefits to be assessed against the property benefitted in the district; and that, in and by such construction, as applied to the proceedings under Ordinances No. 7539, and 3209, the court deprived the plaintiffs in error of a right to be heard, by the jury as to the total benefits to be assessed without any fault on their part, and denied them a right to introduce proof under the original proceedings, of the amount of benefits to all the property in the district without any fault on their part, but, by reason of the default of the city in failing to give them proper notice of the pendency of such proceedings and that, under the construction given to Section 23, *or* Article 6, of the charter of Kansas City, Missouri, aforesaid, the Supreme Court of the State of Missouri denied to the plaintiffs in error due process of law, and denied to them the equal protection of the law guaranteed them by the 14th Amendment to the Constitution of the United States; and that, in so deciding against them in said proceedings, the court denied a right, title, privilege, and immunity given them under and by virtue of the Constitution of the United States.

(5) The trial court erred in refusing to permit the plaintiffs in error to show that the damages to the property proposed to be taken and damaged under Ordinance No. 3209 was not of the amount assessed by the jury; and the trial court denied the plaintiffs in error the right to be heard upon such question in the supplemental proceedings, and, in denying them such right, the court denied to them a right, title, privilege and immunity given them by the 14th Amendment to the Constitution of the United States, in that it denied them due process of law, and denied them the equal protection of the law, and this without any fault or negligence on their
15 part, but wholly by the default of the city in not complying with the terms of Section 2, of Article 6, of the charter of Kansas City, Missouri, aforesaid; and that said right, title, privilege and immunity was claimed by these plaintiffs in error in the Supreme Court of the State of Missouri, and the decision of the said Supreme Court was against such right, title, privilege and immunity, after said right, title, privilege and immunity had been claimed in the trial court, and denied by said trial court; and the Supreme Court of the State of Missouri denied them the right to be heard on the question of damages, and denied them due process of law, and equal protection of law guaranteed them by the 14th Amendment to the Constitution of the United States.

(6) The Supreme Court of the State of Missouri erred in holding that the notice given under Ordinance No. 7539, called the supplemental proceedings, was sufficient to constitute due process of law, as against the plaintiffs in error herein, and, in so holding, the court denied to the plaintiffs in error herein due process of law,

and the equal protection of the law, in violation of the 14th Amendment to the Constitution of the United States.

(7) The Supreme Court of the State of Missouri erred in holding that the plaintiffs in error herein had no right to have a hearing upon the question of the allowance of damages for the property taken, and herein the court erred, for the reason that, under the plain provisions of the charter of Kansas City, Missouri, (Sections 3 & 6 and 23, of Article 6) the plaintiffs in error herein had a right to have a hearing upon the question of the allowance of damages for the property taken, and also the total amount of benefits to be assessed against their property, and the denial of this right deprived the plaintiffs in error of their property without due process of law, as provided for in said charter.

(8) The Supreme Court of the State of Missouri erred in holding that the proceedings under Ordinance No. 7539, pro-
16 vided for by Section 3, of Article 6, of the charter of Kansas City, Missouri, were authorized, and that the same were constitutional, and that the same gave the Municipal Court of Kansas City jurisdiction to hear and determine the supplemental proceedings instituted and carried on thereunder; and that, in and by such rulings, the Supreme Court of the State of Missouri denied the plaintiffs in error herein due process of law guaranteed to them by the 14th Amendment to the Constitution of the United States.

(9) The Supreme Court of the State of Missouri erred in holding that the city of Kansas City could institute supplemental proceedings under Section 23, of article 6, of the charter of Kansas City, Missouri, after a part of the appellants had instituted a suit in the Circuit Court of Jackson County, Missouri, to declare the assessment of benefits against their property null and void for want of proper notice, and in deciding that the judgment of the trial court was of no force and effect, and that the city could supplement proceedings that had already been held void between the city and the appellants herein without complying with the provisions of Section 2, of Article 6, of the charter aforesaid, denied to the plaintiffs in error the rights, privileges and immunities given and guaranteed by the charter of Kansas City and by the law of the land, and, in doing so, the Supreme Court of the State of Missouri denied to the plaintiffs in error herein due process of law, in violation of the 14th Amendment to the Constitution of the United States.

(10) The Supreme Court of the State of Missouri, by its judgment, and by its affirmance of the judgment of the trial court, has deprived the plaintiffs in error, and each of them, of their property without due process of law, and without any notice required by the charter of Kansas City, Missouri, all in violation of the 5th and 14th Amendments to the Constitution of the United States, in that it takes from the plaintiffs in error their property without due process of law, and therefore also violates the 14th Amendment to
17 the Constitution of the United States, in denying the plaintiffs in error the equal protection of the law.

(11) The Supreme Court of the State of Missouri erred in holding that the plaintiffs in error were bound by the decision in the case

of State ex rel. Tuller vs. Seehorn, 246 Mo. —, when the records of the court show that these plaintiffs in error were not parties to said suit, and were therefore not bound by such proceedings; and, in holding that these plaintiffs in error were bound by such decision in a case in which they were not parties, denied to them due process of law guaranteed by the 5th and 14th Amendments to the Constitution of the United States, and further denied to these plaintiffs in error the equal protection of the law, in violation of the 14th Amendment to the Constitution of the United States.

Wherefore, plaintiffs in error ask, by reason of each and every one of the foregoing assignments of error, that the judgment and decision of the Supreme Court of the State of Missouri in the above entitled cause be reversed and for naught held, and that the plaintiffs in error have and recover of the defendant in error all costs herein expended.

ST. LOUIS & KANSAS CITY LAND COMPANY AND
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
By WARNER, DEAN, McLEOD & LANGWORTHY, *Their Attorneys.*
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
By PAUL E. WALKER, *Its Attorneys.*
UNION PACIFIC RAILROAD COMPANY,
By R. W. BLAIR &
WATSON, WATSON & ALFORD,
Its Attorneys.
UNION DEPOT BRIDGE & TERMINAL RAILROAD COMPANY,
By KENNETH McDE WEESE, *Its Attorney.*
EDGEWATER TERMINAL RAILWAY COMPANY AND
MISSOURI PACIFIC RAILWAY COMPANY,
By EDW. J. WHITE, *Their Attorney.*
FEDERAL INVESTMENT COMPANY,
By BALL & RYLAND, *Its Attorneys.*
KANSAS CITY, ST. LOUIS & CHICAGO RAILROAD COMPANY AND
THE CHICAGO & ALTON RAILROAD COMPANY,
By SCARRITT, SCARRITT, JONES & MILLER,
Their Attorneys.
STATE LINE IMPROVEMENT COMPANY,
KANSAS CITY STOCK YARDS COMPANY, AND
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,
By COWHERD, INGRAHAM, DURHAM & MORSE, *Their Attorneys.*

17½ [Endorsed: [No. 18080. St. Louis & Kansas City Land Co., et al., Plaintiffs in Error, vs. Kansas City, Defendant in Error. Filed Aug. 14, 1914. J. D. Allen, Clerk. Assignments of Error. Allowed: Henry Lamm, Chief Justice of Mo. Sup. Court. Aug. 14/14.

18 In the Supreme Court of the State of Missouri.

No. 18080.

ST. LOUIS & KANSAS CITY LAND COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; UNION DEPOT BRIDGE & TERMINAL RAILROAD COMPANY; EDGEWATER TERMINAL RAILWAY COMPANY; MISSOURI PACIFIC RAILWAY COMPANY; FEDERAL INVESTMENT COMPANY; KANSAS CITY, ST. LOUIS & CHICAGO RAILROAD COMPANY; THE CHICAGO & ALTON RAILROAD COMPANY; STATE LINE IMPROVEMENT COMPANY; KANSAS CITY STOCK YARDS COMPANY, and ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellants,

vs.

KANSAS CITY, Respondent.

Bond for Prosecution of Writ of Error to the Supreme Court of the United States.

Know all men by these presents, that we, St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Union Depot Bridge & Terminal Railroad Company, Edgewater Terminal Railway Company, Federal Investment Company, Missouri Pacific Railway Company, Kansas City, St. Louis & Chicago Railroad Company, The Chicago & Alton Railroad Company, State Line Improvement Company, Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company, Appellants, and National Surety Company, New York, New York, are held and firmly bound unto the above named Kansas City in the sum of Twenty Thousand Dollars ($20,000.00), to be paid to the said Kansas City, for the payment of which well and truly to be made, we bind ourselves, and each of us, and each of our heirs, executors, and administrators, jointly and severally firmly by these presents.

Sealed with our seals, and dated the 12th day of August, in the year of our Lord, one thousand nine hundred and fourteen.

Whereas, the above named St. Louis & Kansas City Land
19 Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Union Depot Bridge & Terminal Railroad Company, Edgewater Terminal Railway Company, Federal Investment Company, Missouri Pacific Railway Company, Kansas City, St. Louis & Chicago Railroad Company, The Chicago & Alton Railroad Company, State Line Improvement Company, Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company have prosecuted a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri

to reverse a judgment and decree rendered by the judges of the Supreme Court of the State of Missouri in the above entitled cause.

Now therefore the condition of this obligation is such that, if the above named St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Union Depot Bridge & Terminal Railroad Company, Edgewater Terminal Railway Company, Federal Investment Company, Missouri Pacific Railway Company, Kansas City, St. Louis & Chicago Railroad Company, The Chicago & Alton Railroad Company, State Line Improvement Company, Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs, if they fail to make said writ of error good, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

ST. LOUIS & KANSAS CITY LAND COMPANY AND
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
By WARNER, DEAN, McLEOD & LANGWORTHY, *Their Attorneys.*
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
By PAUL E. WALKER, *Its Attorneys.*
UNION PACIFIC RAILROAD COMPANY,
By R. W. BLAIR &
WATSON, WATSON & ALFORD,
Its Attorneys.
20 UNION DEPOT BRIDGE & TERMINAL RAILROAD COMPANY,
By KENNETH McDE WEESE, *Its Attorney.*
EDGEWATER TERMINAL RAILWAY COMPANY, AND
MISSOURI PACIFIC RAILWAY COMPANY,
By EDW. J. WHITE, *Their Attorney.*
FEDERAL INVESTMENT COMPANY,
By BALL & RYLAND, *Their Attorneys.*
KANSAS CITY, ST. LOUIS & CHICAGO RAILROAD COMPANY AND
THE CHICAGO & ALTON RAILROAD COMPANY,
By SCARRITT, SCARRITT, JONES & MILLER,
Their Attorneys.
STATE LINE IMPOVEMENT COMPANY,
KANSAS CITY STOCK YARDS COMPANY, AND
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,
By COWHERD, INGRAHAM, DURHAM & MORSE, *Their Attorneys.*
[SEAL.] NATIONAL SURETY COMPANY,
By P. O. DRAIN AND
—— ——, *Attorneys-in-Fact.*

Sealed, delivered and taken and acknowledged this — day of ——, A. D. 1914, before me.

—— ——.

Approved by:
HENRY LAMM,
Chief Justice Sup. Court of Mo.

21 In the Supreme Court of the United States, October Term, 1914.

No. —.

ST. LOUIS & KANSAS CITY LAND COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; Chicago, Rock Island & Pacific Railway Company; Union Pacific Railroad Company; Union Depot Bridge & Terminal Railroad Company; Edgewater Terminal Railway Company; Missouri Pacific Railway Company; Federal Investment Company; Kansas City, St. Louis & Chicago Railroad Company; The Chicago & Alton Railroad Company; State Line Improvement Company; Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company, Plaintiffs in Error,
vs.
KANSAS CITY, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Missouri:

Because in the record and proceedings, as also in the rendition of a judgment on a plea which is in the said Supreme Court of the State of Missouri before you, being the highest court of law and equity of the said state in which a decision could be had in a suit between Kansas City, Respondent, and St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Union Depot Bridge & Terminal Railroad Company, Edgewater Terminal Railway Company, Missouri Pacific Railway Company, Federal Investment Company, Kansas City, St. Louis & Chicago Railroad Company, The Chicago & Alton Railroad Company, State Line Improvement Company, Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company, Appellants, wherein was drawn in question the validity of a treaty
22 or statute of, or authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or authority exercised under said state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question

the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption especially set up or claimed under such clause of the Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Union Depot Bridge & Terminal Railroad Company, Edgewater Terminal Railway Company, Missouri Pacific Railway Company, Federal Investment Company, Kansas City, St. Louis & Chicago Railroad Company, The Chicago & Alton Railroad Company, State Line Improvement Company, Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, after judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 30 day of Sept. 1914 next, to the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief
23 Justice of the said Supreme Court, the 12th day of August, in the year of our Lord, One Thousand Nine Hundred and Fourteen.

[Seal of the United States District Court, Western Division, Western District of Missouri.]

JOHN B. WARNER, *Clerk,*
By C. J. MURRAY, *D. C.*

Attest:

HENRY LAMM,
Chief Justice Supreme Court of Mo.

[Endorsed:] No. —. In Supreme Court of Missouri. St. Louis & Kansas City Land Co., et al. plaintiffs in error, vs. Kansas City, defendant in error. Writ of error.

24 In the Supreme Court of Missouri.

No. —.

ST. LOUIS & KANSAS CITY LAND COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; Chicago, Rock Island & Pacific Railway Company; Union Pacific Railroad Company; Union Depot Bridge & Terminal Railroad Company; Edgewater Terminal Railway Company; Missouri Pacific Railway Company; Federal Investment Company; Kansas City, St. Louis & Chicago Railroad Company; State Line Improvement Company; Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company, Plaintiffs in Error,

vs.

KANSAS CITY, MISSOURI, Defendant in Error.

Order.

STATE OF MISSOURI,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by the appellants to the city of Kansas City, in the sum of Twenty-thousand ($20,000.00) Dollars; said bond when approved to act as a supersedeas.

Dated August 14th, 1914.

HENRY LAMM,
Chief Justice Supreme Court of Missouri.

[Endorsed:] Case No. —, Div. No. —. St. Louis & Kansas City Land Company et al., P. E., vs. City of Kansas City, D. E. Filed Aug. 14, 1914. J. D. Allen, Clerk. Order for Writ of Error to the U. S. Supreme Court.

25 In the Supreme Court of the United States, October Term, 1914.

No. —.

ST. LOUIS & KANSAS CITY LAND COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; Chicago, Rock Island & Pacific Railway Company; Union Pacific Railroad Company; Union Depot Bridge & Terminal Railroad Company; Edgewater Terminal Railway Company; Missouri Pacific Railway Company; Federal Investment Company; Kansas City, St. Louis & Chicago Railroad Company; The Chicago & Alton Railroad Company; State Line Improvement Company; Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company, Plaintiffs in Error,

vs.

KANSAS CITY, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

To Kansas City, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within thirty days from date hereof, pursuant to a writ of error filed in the Clerk's Office of the United States District Court for the Western Division of the Western District of Missouri, also filed with the Clerk of the Supreme Court of Missouri wherein St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Union Depot Bridge & Terminal Railroad Company, Edgewater Terminal Railway Company, Missouri Pacific Railway Company, Federal Investment Company, Kansas City, St. Louis & Chicago Railroad Company, The Chicago & Alton Railroad Company, State Line Improvement Company, Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company, are plantiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said
26 plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 1st day of September, in the year of our Lord one thousand nine hundred and fourteen.

HENRY LAMM,
Chief Justice of the Supreme Court of the State of Missouri.

Sept. 4, 1914.

Service of above citation accepted this 4th Day of September, 1914.

ANDREW F. EVANS,
City Counselor, and
JESSE C. PETHERBRIDGE,
Asistant City Counselor of Kansas City, Defendant in Error, and Attorneys of Record for Defendant in Error, Kansas City.

[Endorsed:] No. —. St. Louis & Kansas City Land Co., et al., Plaintiffs in Error, vs. Kansas City, Defendant in Error. Citation. Filed Sep- 7, 1914. J. D. Allen, Clerk.

26½ In the Supreme Court of Missouri, October Term, 1914.

Be it remembered, that on December 10th, 1913, there was filed in the office of the Clerk of this Court, a certain certified copy of the judgment and orders allowing appeal in a certain proceeding entitled "In re Supplemental Proceedings under Ordinance of Kansas City, No. 7539; Kansas City, Missouri, Respondent, v. St. Louis & Kansas City Land Company, et al., Appellants, from the Circuit Court of Jackson County, Missouri, which said transcript is in words and figures as follows, to-wit:

27 Be it remembered that on the 27th day of the regular September Term, 1913, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 11th day of October, 1913, the following proceedings were had and made of record before Hon. Thomas J. Seehorn, Judge of Division No. 3 in the cause entitled:

No. 60282.

In the matter of the supplemental proceedings to ascertain and assess benefits against certain pieces and parcels of land included within the benefit district prescribed by Ordinance No. 3209, approved October 19, 1909, entitled "An ordinance to open and widen Sixth Street from the east line of Bluff Street to the West line of Broadway," and by the authority of Ordinance No. 7539, approved February 8, 1911, which is supplemental to the first ordinance and entitled "An Ordinance providing for, authorizing and directing the institution, carrying on and maintaining of supplemental proceedings to properly assess benefits against certain pieces and parcels of land included within the benefit district prescribed by Ordinance No. 3209, approved the 19th day of October, 1909.

Now on this 11th day of October, 1913, in this the Circuit Court of Jackson County, Missouri, at Kansas City in Division Numbered Three (3), comes the said Kansas City by its City Counselor, and come all persons and parties concerned in this proceeding.

And all motions for a new trial hereof, all motions in arrest of judgment herein, all motions to set aside the verdict of the jury filed herein on the 18th day of September, 1913, and all motions to quash and dismiss these proceedings having been by the Court overruled, and no cause to the contrary now appearing, it is considered, adjudged and decreed by the Court that the verdict of the jury as corrected filed in this proceeding on the 18th day of September, 1913, be, and the same hereby is, in all things approved and confirmed, and said verdict is by the Court adjudged to be binding and conclusive upon each and all of the persons and parties interested in this proceeding, and upon each and all of the persons and parties holding under them or either or any of them.

And said verdict of said jury filed in this proceeding on the 18th day of September, 1913, being in book form, well and substantially bound, and having endorsed on the front cover thereof, in print, the words and figures, following, to-wit:

28 No. 60282.

In the Circuit Court of Jackson County, Missouri, Division No. 3.

Verdict.

In the Matter of Providing for, Authorizing and Directing the Institution, Carrying on and Maintaining of Supplemental Proceedings to Properly Assess Benefits Against Certain Pieces and Parcels of Land Included Within the Benefit District Prescribed by Ordinance No. 3209, Approved October 19, 1909.

the Court now here adopts the said verdict of said jury in these proceedings as a record book of this Court as here containing the said verdict of said jury in this proceeding, the same to stand in full force and effect as if here written and recorded and appearing in full.

It is therefore, considered, adjudged and decreed by the Court that Kansas City, Missouri, pay the benefits assessed against said City by the verdict of the jury in this supplemental proceeding; that Kansas City, Missouri, recover the respective amounts assessed against private property by the verdict of said jury in this supplemental proceeding, the same being the balance of the amount of compensation allowed for the private property condemned, taken or damaged in the original proceeding, instituted or carried on under Ordinance of the said Kansas City, No. 3209, approved October 19, 1909, and entitled "An Ordinance to open and widen Sixth Street from the east line of Bluff Street to the west line of Broadway"; that the several lots and parcels of private property so assessed in this supplemental proceeding with benefits, to pay the balance of the compensation for the land so condemned, taken or damaged in the original proceeding, to which this proceeding is supplemental, shall stand severally charged and be bound for the payment of said respective assessments and interest which may

accrue thereon; that said assessments may be paid without interest if paid within sixty (60) days from this, the 11th day of October, 1913, but if not so paid, said assessments shall bear interest at the rate of seven (7) per centum per annum from this, the 11th day of October, 1913, that if said assessments be not paid and discharged within sixty (60) days from this, the 11th day of October, 1913, the collection of the same with interest thereon at seven (7) per
29 centum per annum from this, the 11th day of October, 1913, together with the cost of such collection, may be enforced by special execution against the lot, tract or parcel of land charged with the lien thereof; that such execution shall issue upon the filing of a statement by the City Treasurer of Kansas City, Missouri, with the Clerk of the Circuit Court of Jackson County, Missouri, showing what assessments are unpaid and against what lots and parcels of land, and the amounts due thereon.

It is further ordered that the jury herein be allowed thirty (30) days' service and discharged; that Kansas City, Missouri, pay all costs of this proceeding.

On the 28th day of the September Term, 1913, the same being October 13, 1913, the following further proceedings were had and made of record, (Record Book No. 8, Page No. 282) to-wit:

Division 3.

No. 60282.

In the Matter of the Proceedings under Ordinance of Kansas City, Missouri, No. 7539, Entitled "An Ordinance Providing for and Authorizing and Directing the Institution, Carrying on and Maintaining of Supplemental Proceedings to Properly Assess Benefits Against Certain Pieces and Parcels of Land within the Benefit District Prescribed by Ordinance No. 3209, Approved October 19, 1909.

Now on this day comes the Missouri Pacific Railway Company, defendant herein, and files its affidavit and application for an appeal from the judgment of this Court to the Supreme Court of the State of Missouri, which appeal is by the Court granted. And the Court fixes bond covering said appeal in the sum of One Thousand ($1000.00) dollars, and said defendant is given until ten (10) days after the final adjournment of the September, 1913, Term of this Court to file said bond and until on or before the 15th day of December, 1913, to file herein its bill of exceptions.

On the 32nd day of the September Term, 1913, the same being October 17, 1913, the following further proceedings were had and made of record, (Record Book No. 8., Page No. 285, to-wit:

30 Division 3.

No. 60282.

In the Matter of the Proceedings under Ordinance of Kansas City, Missouri, No. 7539, Entitled "An Ordinance Providing for and Authorizing and Directing the Institution, Carrying on and Maintaining of Supplemental Proceedings to Properly Assess Benefits Against Certain Pieces and Parcels of Land within the Benefit District Prescribed by Ordinance No. 3209, Approved October 19, 1909.

Now on this day comes the Kansas City, St. Louis and Chicago Railroad Company, and the Chicago and Alton Railroad Company, defendants herein, and file their affidavit and application for an appeal from the judgment of this Court to the Supreme Court of the State of Missouri, which appeal is by the Court granted. And the Court fixes bond covering said appeal in the sum of One Thousand ($1,000.00) dollars, and said appellants are given until ten (10) days after the final adjournment of the September 1913 Term of this Court to file said bond, and until on or before the 15th day of December, 1913, to file herein their bill of exceptions.

On the 33rd day of the September Term, 1913, the same being October 18, 1913, the following further proceedings were had and made of record, (Record Book No. 8, Page No. 288) to-wit:

Division 3.

No. 60282.

In the Matter of the Proceedings under Ordinance of Kansas City, Missouri, No. 7539, Entitled "An Ordinance Providing for and Authorizing and Directing the Institution, Carrying on and Maintaining of Supplemental Proceedings to Properly Assess Benefits Against Certain Pieces and Parcels of Land within the Benefit District Prescribed by Ordinance No. 3209, Approved October 19, 1909.

Now on this day comes the Union Pacific Railroad Company, defendant herein and files its affidavit and application for an appeal from the judgment of this Court to the Supreme Court of the State of Missouri, which appeal is by the Court granted. And the said Union Pacific Railroad Company now files its bond covering said appeal in the sum of One Thousand Dollars ($1,000.00), with H. G. Kaill and I. N. Watson as sureties thereon. And the said Union Pacific Railroad Company is granted until the 15th day of December, 1913, to file herein its bill of exceptions.

31 On the 39th day of the September Term, 1913, the same being October 25, 1913, the following further proceedings were had and made of record, (Record Book No. 8, Page No. 293) to-wit:

Division 3.

No. 60282.

In the Matter of the Proceedings under Ordinance of Kansas City, Missouri, No. 7539, Entitled "An Ordinance Providing for and Authorizing and Directing the Institution, Carrying on and Maintaining of Supplemental Proceedings to Properly Assess Benefits Against Certain Pieces and Parcels of Land within the Benefit District Prescribed by Ordinance No. 3209, Approved October 19, 1909.

Now on this day comes the St. Louis & San Francisco Railroad Company, defendant herein, and files its affidavit and application for an appeal from the judgment rendered herein, to the Supreme Court of the State of Missouri; which appeal is now by the Court granted. And the Court fixes bond covering said appeal in the sum of one Thousand ($1,000.00) dollars, and said appellant is given until ten (10) days after the final adjournment of the September, 1913, Term of this Court to file said bond, and until on or before the 15th day of December, 1913, to file herein its bill of exceptions.

And comes the Kansas City Stock Yards Company of Missouri, defendant herein, and files its affidavit and application for an appeal from the judgment of this Court to the Supreme Court of the State of Missouri; which appeal is by the Court allowed. And said appellant is given until ten (10) days after the final adjournment of the September, 1913, Term of this Court to file bond in the sum of One Thousand ($1,000) dollars covering said appeal, and until on or before the 15th day of December, 1913, to file herein its bill of exceptions.

And comes the State Line Improvement Company, defendant herein, and files its affidavit and application for an appeal from the judgment of this Court to the Supreme Court of the State of Missouri; which appeal is by the Court allowed. And the Court fixes the bond covering said appeal in the sum of One Thousand ($1,000) dollars, and said appellant is given until ten (10) days after the final adjournment of the September 1913, Term of this Court to file said bond, and until on or before the 15th day of December 1913, to file herein its bill of exceptions.

32 And comes the Edgewater Terminal Railway Company, defendant herein, and files its affidavit and application for an appeal from the judgment of this Court to the Supreme Court of the State of Missouri; which appeal is by the Court allowed.

And the Court fixes the bond covering said appeal in the sum of One Thousand ($1,000.00) dollars. Thereupon, said appellant files

herein its bond covering said appeal, in the sum of One Thousand ($1,000.00) dollars, with the Edgewater Terminal Railway Company as principal and H. T. Abernathy and W. A. Wilson as sureties thereon; which bond is by the Court approved. And said defendant is given until or or before the 15th day of December, 1913, to file herein its bill of exceptions.

And comes the Missouri Pacific Railway Company, appellant herein, and files its bond in the sum of One Thousand ($1,000.00) dollars, covering the appeal heretofore allowed said defendant herein, with H. T. Abernathy and W. A. Wilson as sureties thereon; which bond is by the Court approved. And said appellant is given until the 15th day of December, 1913, to file herein its bill of exceptions.

And comes the Chicago, Burlington & Quincy Railroad Company and St. Louis and Kansas City Land Company and severally file their affidavit and application for an appeal from the judgment of this Court to the Supreme Court of the State of Missouri; which appeal is by the Court allowed. And the Court fixes the bond covering said appeal in the sum of One Thousand ($1,000) dollars, and said defendant is given until ten (10) days after the final adjournment of this Court for the September, 1913, Term, hereof, to file said bond and until on or before the 15th day of December, 1913, to file herein its bill of exceptions.

And comes the Chicago, Rock Island & Pacific Railroad Company, defendant herein, and files its affidavit and application for an appeal from the judgment of this Court to the Supreme Court of the State of Missouri; which appeal is by the Court allowed: And the Court fixes the amount of the bond covering said appeal in the sum of One Thousand ($1,000.00) dollars. Thereupon said appellant files its bond in the sum of One Thousand ($1,000.00) covering
33 said appeal, with the Chicago, Rock Island & Pacific Railway Company as principal and Geo. S. Hovey and R. M. Cook as sureties thereon, which bond is by the Court approved. And said defendant is by the Court given until the 15th day of December, 1913, to file herein, its bill of exceptions.

And comes the Federal Investment Company, defendant herein, and files its affidavit and application for an appeal from the judgment of this Court to the Supreme Court of the State of Missouri; which appeal is by the Court allowed. And the Court fixes the amount of the bond covering said appeal in the sum of One Thousand ($1,000.00) dollars. Thereupon said appellant files its appeal bond in the sum of One Thousand ($1,000.00) dollars with the Federal Investment Company as principal and H. M. Merriwether as surety thereon, which bond is by the Court approved. And said defendant is given until the 15th day of December, 1913, to file herein its bill of exceptions.

Now comes the Union Depot Bridge and Terminal Railroad Company, defendant herein, and files its affidavit and application for an appeal from the judgment of this Court to the Supreme Court of the State of Missouri; which appeal is by the Court granted. And the Court fixes the amount of bond covering said appeal in the sum of One Thousand ($1,000.00) dollars. Thereupon, said appellant

files its appeal bond in the sum of One Thousand ($1,000.00) dollars, which bond is by the Court approved. And said defendant is given until the 15th day of December 1913, to file herein its bill of exceptions.

STATE OF MISSOURI,
County of Jackson, ss:

I, James B. Shoemaker, Clerk of the Circuit Court within and for the County and State aforesaid, do hereby certify that the foregoing is a full, true and complete copy of the judgment and orders allowing appeals to the Missouri Pacific Railway Company, The Kansas City St. Louis & Chicago Railroad Company and the
34 Chicago & Alton Railroad Company, The Union Pacific Railroad Company, The St. Louis & San Francisco Railroad Company, The Kansas City Stock Yards Company, The State Line Improvement Company, The Edgewater Terminal Railway Company, The Chicago, Burlington & Quincy Railroad Company and St. Louis and Kansas City Land Company, The Chicago Rock Island and Pacific Railway Company, The Federal Investment Company, and The Union Depot Bridge and Terminal Railway Company, to the Supreme Court of the State of Missouri, in the cause entitled: "In the matter of the supplemental proceedings to ascertain and assess benefits against certain pieces and parcels of land included within the benefit district prescribed by Ordinance No. 3209, approved October 19, 1909, entitled: An Ordinance to open and widen Sixth Street from the east line of Bluff Street to the West line of Broadway," and by the authority of Ordinance No. 7539, approved February 8, 1911, which is supplemental to the first Ordinance and entitled "An Ordinance providing for, authorizing and directing the carrying on and maintaining of supplemental proceedings to properly assess benefits against certain pieces and parcels of land included within the benefit district prescribed by Ordinance No. 3209, approved the 19th day of October, 1909," as the same appears of record in my office in record book No. 8 of the Condemnation records at pages numbered 273, 282, 285, 288, 293.

In witness whereof, I hereunto set my hand and affix the seal of said Circuit Court at office in Kansas City, this 3rd, day of November, A. D. 1913.

[SEAL.] JAMES B. SHOEMAKER, *Clerk.*
By BARCLAY D. MOORE, *Deputy.*

O. K.
SCARRITT, SCARRITT, JONES & MILLER,
Att'ys for K. C., St. L. & C. R. R. Co. & C. & A. Ry. Co.

O. K.
WARNER, DEAN, McLEOD & LANGWORTHY,
Atty's for C., B., & Q. R. R. Co. & St. L. & K. C. Land Co.

Approved:
KENNETH McC DEWEESE,
For Union Depot B. & T. R. R. Co., App.

35 In the Supreme Court of Missouri.

ST. LOUIS & KANSAS CITY LAND COMPANY et al., Plaintiffs in Error,
vs.
KANSAS CITY, MISSOURI, Defendant in Error.

Thereafter, to-wit, on February 10th, 1914, the following further proceedings were had and entered of record in the above entitled cause:

"In re Supplemental Proceedings under Ordinance of Kansas City, No. 7539.

1402 M. D.

KANSAS CITY, MISSOURI, Respondent,
vs.
ST. LOUIS AND KANSAS CITY LAND COMPANY et al., Appellants.

Now at this day the Court having fully considered and understood the motion of the said Respondent to advance this cause on the docket, doth order that said motion be sustained, and that said cause be and the same is hereby advanced and set for hearing in Court in Banc at the April Term, 1914."

36 And thereafter, on May 4th, 1914, the Appellant filed herein its Abstract of the Record, which said Abstract is in words and figures as follows:

In the Supreme Court of Missouri.

In Banc.

No. 18080.

In the Matter of the Supplemental Proceedings to Open and Widen Sixth Street from Bluff Street to Broadway, in Kansas City, Missouri, under Ordinance No. 7539, Entitled "An Ordinance Providing for and Authorizing and Directing the Institution and Maintaining of Supplemental Proceedings to Properly Assess Benefits Against Certain Pieces and Parcels of Land Within the Benefit District Prescribed by Ordinance No. 3209, Approved October 19, 1909."

KANSAS CITY, Respondent,

vs.

ST. LOUIS & KANSAS CITY LAND COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; Chicago, Rock Island & Pacific Railway Company; Union Pacific Railroad Company; Union Depot Bridge & Terminal Railroad Company; Edgewater Terminal Railway Company; Missouri Pacific Railway Company; Federal Investment Company; Kansas City, St. Louis & Chicago Railroad Company; The Chicago & Alton Railroad Company; State Line Improvement Company; Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company, Appellants.

Appellants' Abstract of the Record.

The records of the Circuit Court of Jackson County, Missouri, at Kansas City, show as follows:

That this proceeding was instituted in the Municipal Court of Kansas City and brought to the Circuit Court of Jackson County, Missouri, at Kansas City, by the filing therein on June 28th, 1911, of a transcript of the proceedings in the Municipal Court of Kansas City, Missouri, in an action or proceeding of the same title
37 shown above, which transcript consisted of a certified copy of the above mentioned ordinance of Kansas City, Missouri, No. 7539, together with the certificate of the clerk of said Municipal Court that a verdict and judgment had been rendered in said proceeding and that an appeal had been taken therefrom by the above named appellants to the Circuit Court of Jackson County, Missouri, at Kansas City; that there was filed with said transcript the map or plat referred to in said ordinance; which said ordinance and map or plat are hereinafter set out in full.

That on October 2nd, 1911, said proceeding was assigned to Division No. 3 of said court for trial; that said proceeding was thereafter continued from time to time for the purpose of empaneling a jury therein; that on October 30th, 1911, a jury was duly em-

paneled to try said cause and said proceeding continued to April 28th, 1913, for trial; that on April 4th, 1913, appellants Federal Investment Company, Union Pacific Railroad Company, Missouri Pacific Railway Company and Edgewater Terminal Railway Co., filed their joint and separate answers which are hereinafter set out in full; that on April 28th, 1913, appellants Chicago, Burlington & Quincy Railroad Company and St. Louis & Kansas City Land Company filed their joint and separate answers, appellant Chicago, Rock Island & Pacific Railway Company filed its answer and appellants St. Louis & San Francisco Railroad Company, Kansas City Stock Yards Company and State Line Improvement Company filed their joint and separate answer; that thereupon Kansas City filed its replies to each and every answer hereinbefore mentioned; which answers and replies are hereinafter set out in full; that on said day the trial of said proceedings was begun and was continued for further hearing until April 29th, 1913; that on said April 29th, 1913, the trial of said proceeding was concluded and that thereafter said proceeding was continued from day to day for the purpose of receiving the verdict of the jury; that on June 28th, 1913, and during the May term, 1913, of said court, the jury duly filed its verdict in said proceeding, which said verdict, insofar as it affects said appellants, is hereinafter referred to and set out; that within four days thereafter, to-wit, on July 1st and July 2d, 1913, being respectively the 44th and 45th days of the May term, 1913, of said court, appellants St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Union Depot Bridge & Terminal Railroad Company, Edgewater Terminal Railway Company, Missouri Pacific Railway Company, Federal Investment Company, Kansas City, St. Louis & Chicago Railroad Company and The Chicago & Alton Railroad Company, duly filed therein their separate motions for a new trial in said proceedings, and the appellants State Line Improvement Company, Kansas City Stock Yards Company and St. Louis & San Francisco Railroad
38 Company duly filed therein their separate motions for a new trial of said cause, and also their motions in arrest of judgment; all of which said motions for a new trial and motions in arrest of judgment are hereinafter set out in appellants' bill of exceptions, to which reference is hereby made for the contents thereof.

That on September 13th, 1913, all the parties to said proceedings appeared in court and thereupon the court gave to said jury additional instructions, and directions to correct their verdict. That said court on said day continued said cause to September 18th, 1913, to allow said jury to file a corrected verdict. That thereafter, on September 18th, 1913, same being the ninth day of the September, 1913, term of said court, the jury in said proceedings filed therein a corrected verdict, which said verdict is hereinafter referred to and set out. That thereupon, and on said day all motions for a new trial of said cause, and all motions in arrest of judgment theretofore filed in said cause, being the motions for new trial and in arrest of judgment hereinbefore referred to, were duly re-filed in said cause;

and that on said day appellant Union Depot Bridge & Terminal Railroad Company filed in said cause its motion in arrest of judgment and to dismiss said proceeding, which said motion is hereinafter set out in appellants' bill of exceptions to which reference is hereby made for the contents thereof; that thereafter, on September 20th, 1913, being the eleventh day of the September 1913 term of said court, the appellant Chicago, Rock Island & Pacific Railway Company filed in said cause its motion for a new trial and its motion in arrest of judgment, which said motions are hereinafter set out in appellants' bill of exceptions, to which reference is hereby made for the contents thereof; that thereafter, on September 22nd, 1913, being the thirteenth day of the September 1913 term of said court, the appellants St. Louis & Kansas City Land Company and Chicago, Burlington & Quincy Railroad Company duly filed therein their motions for a new trial of said cause, which motions are hereinafter set out in appellants' bill of exceptions, to which reference is hereby made for the contents thereof.

That thereafter, on October 11th, 1913, being the 27th day of the September term, 1913, of said court, each and all of said motions for new trial were by the court overruled, to which ruling each appellant then and there at the time duly excepted and each and all of said motions in arrest of judgment were overruled, to which ruling each of said appellants at the time excepted; that thereupon, and on said day said court confirmed the corrected verdict hereinbefore referred to and entered judgment in accordance therewith.

That thereafter, during said September term, 1913, of said court, to-wit on October 13th, October 17th, October 18th, and October 25th respectively, said appellants Missouri Pacific Railway Company, Kansas City, St. Louis & Chicago Railroad Company, The
39 Chicago & Alton Railroad Company, Union Pacific Railroad Company, St. Louis & San Francisco Railroad Company, Kansas City Stock Yards Company, State Line Improvement Company, Edgewater Terminal Railway Company, Chicago, Burlington & Quincy Railroad Company, St. Louis & Kansas City Land Company, Chicago, Rock Island & Pacific Railway Company, Federal Investment Company and Union Depot Bridge & Terminal Railroad Company duly filed in said cause their separate applications and affidavits for an appeal of said cause, which said applications and affidavits for appeal are hereinafter set out in the appellants' bill of exceptions to which reference is hereby made for the contents thereof, each of which said affidavits for appeal was in statutory form and was to the effect that the appeal of the appellant was not made for vexation or delay but because the affiant believed that the appellant was aggrieved by the judgment or decision of the court; that said applications and affidavits for appeal were duly approved by the court and an appeal was duly allowed by the court to each appellant on said day, to the Supreme Court of Missouri; that on said day, the court fixed the amount of the appeal bond of each appellant in the sum of One Thousand Dollars; that each of said appellants thereupon filed an appeal bond in said proceeding which was by the court duly approved; that on said day the said court al-

lowed each of said appellants *to* on or before December 15th, 1913, to file a bill of exceptions in said cause.

That thereafter, to-wit, on December 12th, 1913, and during the November term, 1913, of said court, the time of said appellants, and each of them, to file bill of exceptions in said proceeding was by the court extended to February 2nd, 1914; that thereafter, to-wit, on January 29th, 1914, and during the January term, 1914, of said court, the time of said appellants, and each of them, to file bill of exceptions in said cause was by the court extended to March 2nd, 1914; that thereafter on February 25th, 1914, and during the January term, 1914, of said court, the time of said appellants, and each of them, to file bill of exceptions in said cause was by the court extended to April 1st, 1914; that on April 1st, 1914, and during the March term, 1914, of said court, the time of said appellants, and each of them, to file bill of exceptions in said cause was by the court extended to April 8th, 1914; that thereafter, on April 6th, 1914, and during the March term, 1914, of said court, the time of said appellants, and each of them, to file bill of exceptions in said cause was by the court extended to April 13th, 1914.

That thereafter, to-wit, on April 13th, 1914, and during the March term, 1914, of said court, said appellants, and each of them, presented their bill of exceptions hereinafter set out to the said Circuit Court, which said bill of exceptions was by the court and the judge thereof, on said date, duly examined, signed, sealed and allowed, and ordered to be, and was, filed and made a part of the record in said cause, which said bill of exceptions, omitting caption, is hereinafter set out.

The said ordinance, No. 7539, hereinbefore referred to, the answers of the various appellants hereinbefore referred to, and the replies of Kansas City to said answers hereinbefore referred to (omitting caption and signatures) are in the words and figures as follows, to-wit:

Ordinance Number 7539.

"An ordinance providing for, authorizing, and directing the institution, carrying on, and maintaining of supplemental proceedings to properly assess benefits against certain pieces and parcels of land included within the benefit district prescribed by ordinance No. 3209, approved October 19, 1909.

Whereas the Common Council of Kansas City, Missouri, passed an ordinance entitled, 'An Ordinance to Open and Widen Sixth Street from the East line of Bluff Street to the West line of Broadway and repealing Ordinance No. 1750 entitled 'An Ordinance to Open and Widen Sixth Street from the East line of Bluff Street to the West line of Broadway,' approved July 14, 1909," which said ordinance was numbered 3209 and was duly approved October 19, and

Whereas proceedings were instituted under said ordinance in the Municipal Court of Kansas City to condemn the land in said ordi-

nance described and a verdict was rendered in said Municipal Court, and

Whereas by reason of certain errors, defects and omissions certain assessments were made against land in the benefit district prescribed by said ordinance which cannot be enforced or collected and certain pieces of private property in the benefit district were omitted and not assessed by said verdict and

Whereas in order to pay the total amount of damages awarded for land taken and damaged by said condemnation it was and is necessary and required that said certain pieces and parcels of land shall be assessed if they are deemed benefited by the jury.

Now therefore be it ordained by the Common Council of Kansas City:

Sec. 1. That the Mayor and City Counselor are hereby authorized and directed to institute, carry on and maintain supplemental proceedings to properly assess against any piece or parcel of private property within the benefit district prescribed in ordinance No. 3209, approved October 19, 1909, against which an assessment was in the first proceeding wrongfully made or which was omitted to be made, the proper amount such private property, exclu-
41 sive of the improvements thereon, is benefited by the proposed improvement, such amount to be determined by the verdict of a jury in such supplemental proceedings as provided by article 6 of the charter of Kansas City.

Sec. 2. Nothing in this ordinance contained shall be held to limit the scope of such supplemental proceedings but such proceeding shall be deemed to be for the purposes authorized by Article 6 of the Charter of Kansas City.

Sec. 3. Such supplemental proceedings shall be begun in Division No. one of the Municipal Court of Kansas City and shall be known and described as supplemental proceedings for the purposes specified in said ordinance numbered 3209.

Sec. 4. All ordinances or parts of ordinances in conflict with this ordinance are insofar as they conflict with this ordinance hereby repealed.

Joint and Seperate Answer of Defendants Federal Investment Company, Union Pacific Railway Company, Missouri Pacific Railway Company, and Edgewater Terminal Railway Co.

Now comes the Federal Investment Company, Union Pacific Railway Company, Missouri Pacific Railway Company and Edgewater Terminal Railway Company, defendants in the above proceedings and their point and seperate answer state:

(1) That the above named parties and each of them are the owners of land situated within the benefit district prescribed by Ordinance No. 3209, approved October 19th, 1909, and as such owners were first made parties to and brought into the Municipal Court by so called supplemental proceedings under Ordinance No. 7539, approved February 8th, 1911.

(2) That none of the above named parties were served by publication or otherwise, or brought into said Municipal Court by any process whatever in the original proceedings under said Ordinance No. 3209, and were first served and only served by publication of an order issued by said Municipal Court under said Ordinance No. 7539.

(3) That said ordinance No. 7539 of said Kansas City purports to be enacted by the common council of said city pursuant to Section 23 of Article 6 of the Charter of said city; that said ordinance is void and of no effect (*a*) By reason of the fact that the section of the Charter, pursuant to which the ordinance purports to have been passed, provides for such proceeding only on account of some error, omission or defect in the original proceedings, or in the verdict or judgment therein, whereas said original proceedings were absolutely void on account of the failure of Kansas City and its Municipal Court to publish the order made by that court as pre-
42 scribed and required by the Charter; (*b*) By reason of the fact that said Ordinance No. 7539 is vague, indefinite and uncertain in its terms and does not specify the particular errors, defects or omissions purposed to be remedied; (*c*) By reason of the fact that the benefit district prescribed in the original Ordinance No. 3209 comprises an area of the city bounded on the north by the Missouri River, on the west by the State Line between Kansas and Missouri, on the south by Twenty-first Street in said city, and on the east by Troost Avenue in said city, and comprises more than thirteen thousand (13,000) tracts and parcels of land and said so called supplemental ordinance wholly fails to point out and specify any tract or parcel within said benefit district in reference to which the city claims or may claim that there was any error, defect or omission in regard to the assessment of the same, and said so called supplemental ordinance is so vague, indefinite and uncertain in its provisions as to be wholly void.

(4) That the land proposed to be taken in this proceeding is forty (40) feet adjacent to the south side of Sixth Street from the west line of Broadway to Bluff Street; that the benefit district prescribed in said ordinance, as hereinbefore stated, is unreasonable, unjust and oppressive; that Sixth Street for the distance mentioned is not now used as a highway to anything like the extent to which it has heretofore been used for the last thirty (30) years; that in the future it will be still less used for the reason that the Union Station of the city will shortly be permanently removed from what is known as the West Bottoms and the great volume of both the passenger and freight traffic of the city heretofore conducted by the railroads in that locality will be removed therefrom, and the requirements for the use of Sixth Street as a public highway will be greatly and permanently reduced, and the present width of said street, to-wit, sixty (60) feet, is entirely adequate and sufficient to accommodate all present and future traffic.

(5) That the value of the property proposed to be taken in this condemnation proceeding, as fixed by the jury in the original proceeding in the Municipal Court, to-wit, the sum of one hundred

sixty-eight thousand dollars ($168,000.00), is exorbitant and excessive, and the cost thereof at said price or at any price is far in excess of any possible benefit either to the city at large or to any and all property within the benefit district or to both.

(6) Defendants state that by original proceedings in the Municipal Court at Kansas City under Ordinance No. 3209, approved October 19th, 1909, to open and widen Sixth Street from the east line of Bluff Street to the west line of Broadway, said court attempted on the first day of November, 1909, to make an order of publication of notice of said proceedings and the time for the empanelling of a jury for the hearing thereof as provided by the Charter,
43 which notice was not published as required by law for four consecutive weeks in the newspaper doing the city printing and the last insertion was more than seven (7) days prior to the date set for such empanelling of the jury and hearing; that, nevertheless, said court pursuant to said order and without publication of notice as required by law proceeded thereafter to empanel a jury and on the 7th day of March, 1910, said jury returned a verdict awarding damages and assessing benefits to pay for the same against the city and against all the tracts and parcels of land within the benefit district, including the several properties of these defendants, which said verdict was thereafter confirmed and judgment rendered thereon accordingly; that no appeal was taken by any party interested from said judgment within twenty (20) days from the confirmation and rendition thereof; that none of these defendants had any notice or knowledge thereof and no service in said proceedings was had on them or any of them, actually or constructively, and they and each of them first became aware that such proceedings had been had when demand for payment of the assessments adjudged against their properties was made by the city officials with threats of execution for the collection of the same; that thereafter these defendants as plaintiffs instituted in the Circuit Court of Jackson County at Kansas City, Missouri, by their petition a suit in which these defendants were plaintiffs and M. A. Flynn, Kansas City et al., were defendants, being cause numbered 52754 of the docket of this court and defendants therein being the officers of the city in charge of the judgment and collections so threatened to be made, said petition being for the purpose of determining the validity of said proceedings, to have the same decreed null and void as to these defendants and each of them and as to their several properties, to enjoin the defendants in said cause from taking any action to enforce the collection of said assessments; that thereafter, said cause coming on for trial at the January Term, 1911, of this court, the same was duly heard and tried, and the court being fully advised in the premises, all parties being present by their respective counsel, found the issues in favor of the plaintiffs therein, to-wit, these defendants; found, adjudged and decreed as to these defendants and their respective properties, said proceedings in said Municipal Court under said Ordinance No. 3209 were null and void and of no force and effect and same should be held for naught, and that the defendants therein be perpetually enjoined from making out, certifying or at-

testing any tax bills against the several properties of these defendants or any of them and from taking any action to collect the same; that said finding, judgment and decree of the court became and is final, no motions for a new trial having been filed therein and no appeal having been taken therefrom by any of the parties thereto; that by reason of the premises said judgment is now pleaded by these defendants as res judicata and a bar to these pro-
44 ceedings, and as establishing by said former judgment that said original proceedings and judgment in the Municipal Court were and are as to these defendants wholly null and void, and can not be supplemented as herein attempted by said city as against these defendants and their several properties.

Wherefore, these defendants pray the court to render judgment dismissing these proceedings as to the defendants and their several properties and that they be hence discharged with their costs.

Joint and Separate Answer of Defendants Chicago, Burlington & Quincy Railroad Company and St. Louis & Kansas City Land Company.

Now comes the Chicago, Burlington & Quincy Railroad Company and St. Louis & Kansas City Land Company, defendants in the above proceedings, and for their joint and separate answer state:

(1) That the above named parties and each of them are the owners of land situated within the benefit district prescribed by Ordinance No. 3209, approved October 19th, 1909, and as such owners were first made parties to and brought into the Municipal Court by so called supplemental proceedings under Ordinance No. 7539, approved February 8th, 1911.

(2) That none of the above named parties were served by publication or otherwise, or brought into said Municipal Court by any process whatever in the original proceedings under said Ordinance No. 3209, and were first served and only served by publication of an order issued by said Municipal Court under said Ordinance No. 7539.

(3) That said Ordinance No. 7539 of said Kansas City purports to be enacted by the Common Council of said city pursuant to Section 23 of Article 6 of the Charter of said city; that said Ordinance is void and of no effect (*a*) By reason of the fact that the section of the Charter, pursuant to which the ordinance purports to have been passed, provides for such proceeding only on account of some error, omission or defect in the original proceedings, or in the verdict or judgment therein, whereas said original proceedings were absolutely void on account of the failure of Kansas City and its Municipal Court to publish the order made by that Court as prescribed and required by the Charter; (*b*) By reason of the fact that said Ordinance No. 7539 is vague, indefinite and uncertain in its terms and does not specify the particular errors, defects or omissions purposed to be remedied; (*c*) By reason of the fact that the benefit district prescribed in the original Ordinance No. 3209 comprises an area

of the city bounded on the north by the Missouri River, on the west by the State Line between Kansas and Missouri, on the south
45 by Twenty-first Street in said city, and on the east by Troost Avenue in said city, and comprises more than thirteen thousand (13,000) tracts and parcels of land and said so called supplemental ordinance wholly fails to point out and specify any tract or parcel within said benefit district in reference to which the city claims or may claim that there was any error, defect or omission in regard to the assessment of the same, and said so called supplemental ordinance is so vague, indefinite and uncertain in its provisions as to be wholly void.

(4) That the land proposed to be taken in this proceeding is forty (40) feet adjacent to the south side of Sixth Street from the west line of Broadway to Bluff Street; that the benefit district prescribed in said ordinance, as hereinbefore stated, is unreasonable, unjust and oppressive; that Sixth Street for the distance mentioned is not now used as a highway to anything like the extent to which it has heretofore been used for the last thirty (30) years; that in the future it will be still less used for the reason that the Union Station of the city will shortly be permanently removed from what is known as the West Bottoms and the great volume of both the passenger and freight traffic of the city heretofore conducted by the railroads in that locality will be removed therefrom, and the requirements for the use of Sixth Street as a public highway will be greatly and permanently reduced and the present width of said street, to-wit, sixty (60) feet, is entirely adequate and sufficient to accommodate all present and future traffic.

(5) That the value of the property proposed to be taken in this condemnation proceeding, as fixed by the jury in the original proceeding in the Municipal Court, to-wit, the sum of one hundred sixty-eight thousand dollars ($168,000.00), is exorbitant and excessive, and the cost thereof at said price or at any price is far in excess of any possible benefit either to the city at large or to any and all property within the benefit district or to both.

(6) Defendants state that by original proceedings in the Municipal Court at Kansas City under Ordinance No. 3209, approved October 19th, 1909, to open and widen Sixth Street from the east line of Bluff Street to the west line of Broadway, said court attempted on the first day of November, 1909, to make an order of publication of notice of said proceedings and the time for the empanelling of a jury for the hearing thereof as provided by the Charter, which notice was not published as required by law for four consecutive weeks in the newspaper doing the city printing and the last insertion was more than seven (7) days prior to the date set for such empanelling of the jury and hearing; that, nevertheless, said court pursuant to said order and without publication of notice as required by law proceeded thereafter to empanel a jury and on the 7th day of March,
1910, said jury returned a verdict awarding damages and
46 assessing benefits to pay for the same against the city and against all the tracts and parcels of land within the benefit district, including the several properties of these defendants, which

said verdict was thereafter confirmed and judgment rendered thereon accordingly; that no appeal was taken by any party interested from said judgment within twenty (20) days from the confirmation and rendition thereof; that none of these defendants had any notice or knowledge thereof and no service in said proceedings was had on them or any of them, actually or constructively, and they and each of them first became aware that such proceedings had been had when demand for payment of the assessments adjudged against their properties was made by the city officials with threats of execution for the collection of the same; that thereafter the Union Pacific Railway Company and others who were and are owners of property in said benefit district, and co-defendants herein, instituted in the Circuit Court of Jackson County, at Kansas City, Missouri, by their petition a suit in which said Union Pacific Railway Company et al., were plaintiffs and M. A. Flynn, Kansas City et al., were defendants, being cause numbered 52754 of the docket of this court and the defendants therein being the officers of the city in charge of the judgment and collections so threatened to be made, said petition being for the purpose of determining the validity of said proceedings, to have the same decreed null and void as to Union Pacific Railway Company et al., and each of them and as to their several properties, to enjoin the defendants in said cause from taking any action to enforce the collection of said assessments; that thereafter, said cause coming on for trial at the January term, 1911, of this court, the same was duly heard and tried, and the court being fully advised in the premises, all parties being present by their respective counsel, found the issues in favor of the plaintiffs therein, to-wit, the said Union Pacific Railway Company et al.; found, adjudged and decreed as to said co-defendants and their respective properties, said proceedings in said Municipal Court under said Ordinance No. 3209 were null and void and of no force and effect and same should be held for naught, and that the defendants therein be perpetually enjoined from making out, certifying or attesting any tax bills against the several properties of said co-defendants or any of them and from taking any action to collect the same; that said finding, judgment and decree of the court became and is final, no motions for a new trial having been filed therein and no appeal having been taken therefrom by any of the parties thereto; that by reason of the premises said judgment is now pleaded by these defendants as res judicata and a bar to these proceedings, and as establishing by said former judgment that said original proceedings and judgment in the Municipal Court were and are as to these defendants wholly null and void, and can not be supplemented as herein attempted by said city as against these defendants and their several properties.

47 Wherefore, these defendants pray the court to render judgment dismissing these proceedings as to the defendants and their several properties and that they be hence discharged with their costs.

Separate Answer of Defendant The Chicago, Rock Island and Pacific Railway Co.

Now comes The Chicago, Rock Island and Pacific Railway Company, one of the defendants in the above proceedings, and for its separate answer states:

(1) That the said defendant is the owner of land situated within the benefit district prescribed by Ordinance No. 3209, approved October 19th, 1909, and as such owner was first made party to and brought into the Municipal Court by so called supplemental proceedings under Ordinance No. 7539, approved February 8th, 1911.

(2) That this defendant was not served by publication or otherwise, or brought into said Municipal Court by any process whatever in the original proceedings under said Ordinance No. 3209, and was first served and only served by publication of an order issued by said Municipal Court under said Ordinance No. 7539.

(3) That said Ordinance No. 7539 of said Kansas City purports to be enacted by the Common Council of said city pursuant to Section 23 of Article 6 of the Charter of said city; that said ordinance is void and of no effect; (*a*) By reason of the fact that the section of the Charter, pursuant to which the ordinance purports to have been passed, provides for such proceeding only on account of some error, omission or defect in the original proceedings, or in the verdict or judgment therein, whereas said original proceedings were absolutely void on account of the failure of Kansas City and its Municipal Court to publish the order made by that court as prescribed and required by the Charter; (*b*) By reason of the fact that said Ordinance No. 7539 is vague, indefinite and uncertain in its terms and does not specify the particular errors, defects or omissions purported to be remedied; (*c*) By reason of the fact that the benefit district prescribed in the original Ordinance No. 3209 comprises an area of the city bounded on the north by the Missouri River, on the west by the State Line between Kansas and Missouri, on the south by Twenty-first Street in said city, and on the east by Troost Avenue in said city, and comprises more than thirteen thousand (13,000) tracts and parcels of land and said so called supplemental ordinance wholly fails to point out and specify any tract or parcel within said benefit district in reference to which the city claims or may claim that there was any error, defect or omission in regard to the assessment of the same, and said so called
48 supplemental ordinance is so vague, indefinite and uncertain in its provisions as to be wholly void.

(4) That the land proposed to be taken in this proceeding is forty (40) feet adjacent to the south side of Sixth Street from the west line of Broadway to Bluff Street; that the benefit district prescribed in said ordinance, as hereinbefore stated, is unreasonable, unjust and oppressive; that Sixth Street for the distance mentioned is not now used as a highway to anything like the extent to which it has heretofore been used for the last thirty (30) years; that in the future it will be still less used for the reason that the Union

Station of the city will shortly be permanently removed from what is known as the West Bottoms and the great volume of both the passenger and freight traffic of the city heretofore conducted by the railroads in that locality will be removed therefrom, and the requirements for the use of Sixth Street as a public highway will be greatly and permanently reduced, and the present width of said street, to-wit, sixty (60) feet, is entirely adequate and sufficient to accommodate all present future traffic.

(5) That the value of the property proposed to be taken in this condemnation proceeding, as fixed by the jury in the original proceeding in the Municipal Court, to-wit, the sum of one hundred sixty-eight thousand dollars ($168,000.00) is exorbitant and excessive, and the cost thereof at said price or at any price is far in excess of any possible benefit either to the city at large or to any and all property within the benefit district or to both.

(6) This defendant states that by original proceedings in the Municipal Court at Kansas City under Ordinance No. 3209, approved October 19th, 1909, to open and widen Sixth Street from the east line of Bluff Street to the west line of Broadway, said court attempted on the first day of November, 1909, to make an order of publication of notice of said proceedings and the time for the empanelling of a jury for the hearing thereof as provided by the Charter, which notice was not published as required by law for four consecutive weeks in the newspaper doing the city printing and the last insertion was more than seven (7) days prior to the date set for such empanelling of the jury and hearing; that, nevertheless, said court pursuant to said order and without publication of notice as required by law proceeded thereafter to empanel a jury and on the 7th day of March, 1910, said jury returned a verdict awarding damages and assessing benefits to pay for the same against the city and against all the tracts and parcels of land within the benefit district, including the several properties of this defendant, which said verdict was thereafter confirmed and judgment rendered thereon accordingly; that no appeal was taken by any party interested from said judgment within twenty (20) days from the confirmation and rendition thereof; that this defendant had no notice or knowledge thereof and no service in said proceedings was had on it, actually or con-
49 structively, and this defendant first became aware that such proceedings had been had when demand for payment of the assessments adjudged against its property was made by the city officials with threats of execution for the collection of the same; that thereafter certain owners of property in the benefit district as plaintiffs instituted in the Circuit Court of Jackson County, at Kansas City, Missouri, by their petition, a suit in which they were plaintiffs and M. A. Flynn, Kansas City et al., were defendants, being cause numbered 52754 of the docket of this court and defendants therein being the officers of the city in charge of the judgment and collections so threatened to be made, said petition being for the purpose of determining the validity of said proceedings, to have the same decreed null and void as to said defendants and each of them and as to their several properties, to enjoin the defendants

in said cause from taking any action to enforce the collection of said assessments; that thereafter, said cause coming on for trial at the January term, 1911, of this court, the same was duly heard and tried, and the court being fully advised in the premises, all parties being present by their respective counsel, found the issues in favor of the plaintiffs therein; found, adjudged and decreed as to plaintiff in said suit and their respective properties, said proceedings in said Municipal Court under said Ordinance No. 3209 were null and void and of no force and effect and same should be held for naught, and that the defendants therein be perpetually enjoined from making out, certifying or attesting any tax bills against the several properties of said plaintiffs, or any of them, and from taking any action to collect the same; that said finding, judgment and decree of the court became and is final, no motion for a new trial having been filed therein and no appeal having been taken therefrom by any of the parties thereto; that by reason of the premises said judgment is now pleaded by this defendant as res adjudicata and a bar to these proceedings, and as establishing by said former judgment that said original proceedings, and judgment in the Municipal Court were and are as to this defendant wholly null and void, and can not be supplemented as herein attempted by said city as against this defendant and its property.

Wherefore, this defendant prays the court to render judgment dismissing these proceedings as to this defendant and its property and that it go hence discharged with its costs.

Joint and Separate Answer of Defendants St. Louis and San Francisco Railroad Company, The Kansas City Stock Yards Company of Missouri, and State Line Improvement Company.

Now come St. Louis and San Francisco Railroad Company, the Kansas City Stock Yards Company of Missouri and State Line Improvement Company, defendants in the above proceeding, and for their joint and separate answer state:

50 1. That the said defendants are the owners of land situated within the benefit district prescribed by Ordinance No. 3209, approved October 19th, 1909, and as such owners were first made parties to and brought into the Municipal Court by so called supplemental proceedings under Ordinance No. 7539, approved February 8th, 1911.

2. That these defendants were not served by publication or otherwise, or brought into said Municipal Court by any process whatever in the original proceedings under said Ordinance No. 3209, and were first served and only served by publication of an order issued by said Municipal Court under said Ordinance No. 7539.

3. That said Ordinance No. 7539 of said Kansas City purports to be enacted by the Common Council of said city pursuant to Section 23 of Article 6 of the Charter of said city; that said ordinance is void and of no effect; (*a*) by reason of the fact that the section of the Charter, pursuant to which the ordinance purports to have been

passed, provides for such proceeding only on account of some error, omission or defect in the original proceedings, or in the verdict or judgment therein, whereas said original proceedings were absolutely void on account of the failure of Kansas City and its Municipal Court to publish the order made by that court as prescribed and required by the Charter; (b) by reason of the fact that said Ordinance No. 7539 is vague, indefinite and uncertain in its terms and does not specify the particular errors, defects or omissions purposed to be remedied; (c) by reason of the fact that the benefit district prescribed in the original Ordinance No. 3209 comprises an area of the city bounded on the north by the Missouri River, on the west by the State line between Kansas and Missouri, on the south by Twenty-first Street in said city, and on the east by Troost Avenue in said city, and comprises more than thirteen thousand (13,000) tracts and parcels of land and said so called supplemental ordinance wholly fails to point out and specify any tract or parcel within said benefit district in reference to which the city claims or may claim that there was any error, defect or omission in regard to the assessment of the same, and said so called supplemental ordinance is so vague, indefinite and uncertain in its provisions as to be wholly void.

4. That the land proposed to be taken in this proceeding is forty (40) feet adjacent to the south side of Sixth Street from the west line of Broadway to Bluff Street; that the benefit district prescribed in said ordinance, as hereinbefore stated, is unreasonable, unjust and oppressive; that Sixth Street for the distance mentioned is not now used as a highway to anything like the extent to which it has heretofore been used for the last thirty (30) years; that in the future it will be still less used for the reason that the Union Station of the city will shortly be permanently removed from what is known as the
51 West Bottoms and the great volume of both the passenger and freight traffic of the city heretofore conducted by the railroads in that locality will be removed therefrom, and the requirements for the use of Sixth Street as a public highway will be greatly and permanently reduced, and the present width of said street, to-wit, sixty (60) feet, is entirely adequate and sufficient to accommodate all present and future traffic.

5. That the value of the property proposed to be taken in this condemnation proceeding, as fixed by the jury in the original proceeding in the Municipal Court, to-wit, the sum of one hundred sixty-eight thousand dollars ($168,000) is exorbitant and excessive and the cost thereof at said price, or at any price, is far in excess of any possible benefit either to the city at large or to any and all property within the benefit district, or to both.

6. These defendants state, that by original proceedings in the Municipal Court at Kansas City under Ordinance No. 3209, approved October 19, 1909, to open and widen Sixth Street from the east line of Bluff Street to the west line of Broadway, said court attempted on the first day of November, 1909, to make an order of publication of notice of said proceedings and the time for the empanelling of the jury for the hearing thereof, as provided by the charter, which notice was not published as required by law for four

consecutive weeks in the newspaper doing the city printing and the last insertion was more than seven (7) days prior to the date set for such empanelling of the jury and hearing; that nevertheless said court, pursuant to said order, and without publication of notice as required by law, proceeded thereafter to empanel the jury and on the 7th day of March, 1910, said jury returned a verdict awarding damages and assessing benefits to pay for the same against the city and against all the tracts and parcels of land within the benefit district, including the several properties of this defendant, which said verdict was thereafter confirmed and judgment rendered thereon accordingly; that no appeal was taken by any party interested from said judgment within twenty (20) days from the confirmation and rendition thereof; that these defendants had no notice or knowledge thereof and no service in said proceedings was had on them, actually or constructively, and these defendants first became aware that such proceedings had been had when demand for payment of the assessments adjudged against their property was made by the city officials with threats of execution for the collection of the same; that thereafter certain owners of property in the benefit district as plaintiffs instituted in the Circuit Court of Jackson County, at Kansas City, Missouri, by their petition, a suit in which they were plaintiffs and M. A. Flynn, Kansas City et al., were defendants, in which suit these defendants entered their appearance, being cause numbered 52754 of the docket of this court and defendants therein being the officers of the city in charge of the judgment and collections so threatened to be
52 made, said petition being for the purpose of determining the validity of said proceedings, to have the same decreed null and void as to said defendants and each of them and as to their several properties, to enjoin the defendants in said cause from taking any action to enforce the collection of said assessments; that thereafter, said cause coming on for trial at the January term, 1911, of this court, the same was duly heard and tried, and the court being fully advised in the premises, all parties being present by their respective counsel, found the issues in favor of the plaintiffs therein; found, adjudged and decreed as to plaintiffs in said suit and their respective properties, said proceedings in said Municipal Court under said Ordinance No. 3209 were null and void and of no force and effect and same should be held for naught, and that the defendants therein be perpetually enjoined from making out, certifying or attesting any tax bills against the several properties of said plaintiffs, or any of them, and from taking any action to collect the same; said finding, judgment and decree of the court became and is final, no motion for a new trial having been filed therein and no appeal having been taken therefrom by any of the parties thereto; that by reason of the premises said judgment is now pleaded by these defendants as res adjudicata and a bar to these proceedings and as establishing by said former judgment that said original proceedings, and judgment in the Municipal Court were and are as to these defendants fully null and void, and cannot be supplemented as herein attempted by said city as against these defendants and their properties.

Wherefore, these defendants pray the court to render judgment dismissing these proceedings as to these defendants and their properties and that they go hence discharged with their costs.

Reply.

Kansas City filed a general denial reply to each of the foregoing answers.

Stipulation as to Bill of Exceptions and Abstract of Record.

Appellants and respondent in this cause entered into and filed the following stipulation which is as follows:

In the Circuit Court of Jackson County, Missouri, at Kansas City, Division No. 3, September Term, 1911.

In the Matter of the Supplemental Proceeding for the Opening and Widening of Sixth Street from the East Line of Bluff Street to the West Line of Broadway.

No. 60262.

Stipulation as to Bill of Exceptions and Abstract of Record.

Whereas, the Missouri Pacific Railway Company and twelve other defendants, appellants in the above entitled cause have caused
53 to be prepared by the official stenographer of Division No. 3 of the Circuit Court of Jackson County, Missouri, at Kansas City, their joint bill of exceptions for the appeal of the above entitled cause to the Supreme Court of the State of Missouri;

And whereas, to avoid delay and the necessity of copying in said bill of exceptions certain documentary exhibits, and to save the expense thereof:

It is hereby stipulated and agreed, by and between Kansas City, Missouri, through the city counsellor's office, with the several defendants, appellants, through their counsel, as follows:

1. On page 56 of said bill of exceptions, there was introduced on behalf of Kansas City a bound volume containing the maps or plats and referred to as Exhibit 5 in the bill of exceptions. It is agreed that said exhibit shall not be copied in the bill of exceptions, but that Kansas City, Missouri, is to produce the original of said exhibit on the hearing of this cause in the Supreme Court, and that the same shall be used on said hearing, and in said arguments on said hearing, with the same force and effect as though copied in and made a part of this bill of exceptions.

It is further agreed that the exhibit hereto attached to this stipulation, made a part hereof, and marked Exhibit "A," shall be used in the preparation of the abstract of record, briefs and arguments in said cause, with the same force and effect as the original exhibit intro-

duced in evidence, and appearing at page 56 of said bill of exceptions.

It is also stipulated and agreed that the same terms and conditions shall apply in regard to the original plat and verdict of jury in said cause, marked Exhibit "5," and appearing at page 103 of said bill of exceptions.

2. It is further stipulated and agreed that the Exhibit "E," appearing at page 139 of said bill of exceptions—being Ordinance No. 2336 of Kansas City, Missouri, approved July 7, 1909—commonly known as the "Union Depot Ordinance"—shall be produced by Kansas City, Missouri, at the hearing and argument of said cause in the Supreme Court, and may be there used and referred to with the same force and effect as though copied in and made a part of this bill of exceptions.

It is further agreed that said ordinance need not be copied in said bill of exceptions.

3. It is hereby further stipulated and agreed that Exhibit "I-1," appearing at page 172 of the said bill of exceptions—and calling for all pleadings in case No. 52754, in the Circuit Court of Jackson County, Missouri, entitled "Union Pacific Railway Company, Complainant, vs. M. A. Flynn, Clerk of Kansas City, Missouri et al., Defendants," need not all be copied in said bill of exceptions. A portion of said original pleadings in said cause have been lost or
54 destroyed, and the remaining portion of said pleadings are practically all copied in said bill of exceptions.

4. It is hereby agreed that Exhibit "K," appearing at page 175 of said bill of exceptions—being the "Entry of Appearance and Intervening Petition of George S. Graham and H. G. Kaill, in case No. 52754,—has been lost or misplaced. It is agreed that said intervening petition need not be copied in said bill of exceptions.

5. It is further stipulated and agreed that the Exhibit "M-1"—being the verdict in the Beardsley Street Proceeding under Ordinance No. 35965, of Kansas City, Missouri, approved May 21, 1907—appearing at pages 225 and 230 need not be copied in said bill of exceptions.

It is further agreed that Exhibit "C," hereto attached and made a part of this stipulation, shall be used in the preparation of the abstract of record, briefs and argument on the hearing of said cause in the Supreme Court, with the same force and effect as the original exhibit offered and introduced at pages 225 and 230 of said record.

6. It is further stipulated and agreed that Exhibit "M-2"—being the verdict in the Twelfth Street Traffic Way Proceeding under Ordinance No. 8316, of Kansas City, Missouri, approved May 10, 1911, and appearing at page 232 of said bill of exceptions need not be copied in said bill of exceptions.

It is further stipulated and agreed that Exhibit "D," attached to and made a part of this stipulation, shall be used in the preparation of the abstract of record, briefs, arguments and hearing of said cause in the Supreme Court, with the same force and effect as the original exhibit introduced in said bill of exceptions at page 232.

7. It is further stipulated and agreed that the verdict of the jury in this case, filed on June 28, 1913, and appearing at page 304 of said bill of exceptions, need not be copied in said bill of exceptions; but, that Kansas City, Missouri, shall produce the original verdict upon the hearing and arguments of said cause in the Supreme Court, and that the same shall be used with the same force and effect as though copied full in said bill of exceptions.

It is further stipulated and agreed that Exhibit "E," hereto attached and made a part of this stipulation, shall be used in the preparation of the abstract of record, briefs, hearing and arguments in the Supreme Court, with the same force and effect as the original verdict of the jury offered and introduced in said bill of exceptions at page 304.

8. It is further stipulated and agreed that the corrected verdict of the jury in this case, filed on September 18, 1913, and appearing at page 372 of said bill of exceptions, need not be copied in said bill of exceptions; but, that Kansas City, Missouri, shall
54½ produce the original corrected verdict upon the hearing and argument of said cause in the Supreme Court, and that the same shall be used with the same force and effect as though copied in full in said bill of exceptions.

It is further stipulated and agreed that Exhibit "F," hereto attached and made a part of this stipulation, shall be used in the preparation of the abstract of record, briefs, hearing and arguments in the Supreme Court, with the same force and effect as the original corrected verdict of the jury offered and introduced in said bill of exceptions at page 372.

9. It is further stipulated and agreed that the original record of the original proceedings under Ordinance No. 3209—showing the property damaged, benefits assessed, verdict of jury and judgment of court thereon, and appearing at page 290 of said bill of exceptions—need not be copied in the said bill of exceptions; but that the same shall be produced on the hearing and arguments in said cause in the Supreme Court, and used with the same force and effect as though copied in and made a part of said bill of exceptions.

It is further stipulated and agreed that Exhibit "G," attached to and made a part of this stipulation, shall be used in the preparation of the abstract of record, briefs and arguments of said cause in the Supreme Court, with the same force and effect as the original proceedings under Ordinance No. 3209, offered in evidence at page 290 of the bill of exceptions.

Exhibit "A."

It is hereby stipulated and agreed that the maps and plats introduced in the Circuit Court in the Supplemental Proceeding to open and widen Sixth Street, being Exhibit "5" offered and introduced in evidence at page 56 of the bill of exceptions, contains, among other things the names of the property owners in the District whose property was taken, also the names of all the property

owners in the benefit district whose property was assessed and the word Paid in red stamp was stamped over the names of all property owners who had paid the assessment made in the original proceedings under ordinance No. 3209.

None of the said defendants, appellants, have paid the benefits assessed against their property under said verdict, as shown by said plat offered in evidence as Exhibit "5," and appearing at pages 56 and 103 of the bill of exceptions.

It is further stipulated and agreed that certain other property owners have paid the benefits assessed against their property, the total amount of said benefits paid into the City Treasurer's office of Kansas City, Missouri, being $89,317.59. The total amount of the verdict for damages to property taken being $166,299.57.

55 EXHIBIT "C."

It is stipulated and agreed that the verdict in the Beardsley Street Proceeding under Ordinance No. 35965, approved May 21, 1907—and appearing at pages 225 and 230 of the bill of exceptions, contains, among other things, the following:

That the total amount of damages assessed by the verdict in said proceedings for the property taken was $36,921.

That the total amount of benefits assessed against the property in the benefit district was $36,790.08.

That the said property has all been acquired under said proceeding, and the benefits have all been paid.

That the property of none of the defendants, appellants, herein, was taken for said Beardsley Street Proceedings; but the property of said defendants, appellants herein, was assessed benefits in said proceeding, as follows:

Property of	
Federal Investment Company	None
Union Pacific Railroad Company	$6,001.28
St. Louis & Kansas City Land Company	359.79
Chicago, Burlington & Quincy Railroad Company	2,760.52
Chicago, Burlington & Quincy Railway Company	7,368.45
Hannibal & St. Joseph Railway Company	2,760.52
Kansas City, St. Joseph & Council Bluffs Railroad Company	2,878.81
Chicago, Rock Island & Pacific Railroad Company	1,488.58
Union Depot Bridge & Terminal Railroad Company	None
The Missouri Pacific Railway Company	None
Kansas City Stock Yards Company of Missouri	3,972.47
Edgewater Terminal Railway Company	None
State Line Improvement Company	None
St. Louis & San Francisco Railroad Company	513.54
The Chicago & Alton Railroad Company	3,558.93
The Kansas City, St. Louis & Chicago Railroad Company	3,902.09

EXHIBIT "D."

It is hereby stipulated and agreed that the verdict in the Twelfth Street Trafficway Proceeding, under Ordinance No. 8316, approved May 19, 1911, contains, among other things, the following:

That the total amount of damages assessed by the verdict in said proceeding for the property taken was $310,144.25.

That the total amount of benefits assessed against the property in the benefit district was $310,138.25.

That the said property has all been acquired under said
56 proceeding, and the benefits have practically all been paid excepting the amounts for which condemnation certificates were issued.

That the property of none of the defendants, appellants herein, was taken for said Twelfth Street Trafficway Proceeding; but the property of said defendants, appellants herein, was assessed benefits in said proceeding, as follows:

Property of

Federal Investment Company	None
Union Pacific Railroad Company	$3,600.
St. Louis & Kansas City Land Company	2,681.20
Chicago, Burlington & Quincy Railroad Company	4,894.11
Chicago, Burlington & Quincy Railway Company	None
Hannibal & St Joseph Railway Company	None
Kansas City, St. Joseph & Council Bluffs Railroad Company	None
Chicago, Rock Island & Pacific Railway Company	3,576.99
Union Depot Bridge & Terminal Company	None
The Missouri Pacific Railway Company	5,817.75
Kansas City Stock Yards Company of Missouri	7,634.18
Edgewater Terminal Railway Company	None
State Line Improvement Company	None
St. Louis & San Francisco Railroad Company	3,337.73
The Chicago & Alton Railroad Company	2,475.44
The Kansas City, St. Louis & Chicago Railroad Company	None

This evidence was excluded by the court as incompetent, irrelevant and immaterial, under the objection of the city thereto, and the city still contends that said ruling was proper, and does not waive any of its objections thereto by this stipulation.

EXHIBIT "E."

It is hereby stipulated and agreed that the verdict of the jury in this cause, and appearing at page 304 of the bill of exceptions, filed on June 28, 1913, contains, among other things, the following:

The total amount of the benefits assessed against property in the benefit district is $76,980.98.

None of the property of the defendants, appellants herein, was taken for the widening of Sixth Street, and none of said defendants were paid damages for property so taken; but, the property of all of said defendants, appellants herein, was assessed benefits as follows:

Property of

	Federal Investment Company	$1,103.20
	Union Pacific Railroad Company	2,960.81
	St. Louis & Kansas City Land Company	907.76
57	Chicago, Burlington & Quincy R'd Co.	62.01
	Hannibal & St. Joseph Railway Co.	200.63
	Hannibal & St. Joseph Railway Co. and Chicago, Burlington & Quincy Ry. Co., combined, were assessed	2,574.54
	Kansas City, St. Joseph & Council Bluffs R'd Co.	43.71
	Kansas City, St. Joseph & Chicago R'd Co.	16.16
	Kansas City, St. Joseph & Council Bluffs Ry. Co. and Chicago, Burlington & Quincy Ry. Co., combined, were assessed	2,484.49
	Chicago, Rock Island & Pacific Railway Company	872.03
	Union Depot Bridge & Terminal Railroad Company and others combined, were assessed	4,816.94
	The Missouri Pacific Railway Company	4,590.28
	Kansas City Stock Yards Company of Missouri	4,728.24
	Edgewater Terminal Railway Company	211.47
	State Line Improvement Company	1,286.62
	St. Louis & San Francisco Railroad Co.	3,687.35
	The Chicago & Alton Railroad Company and The Kansas City, St. Louis & Chicago Railroad Company combined were assessed	2,134.68

EXHIBIT "F."

It is stipulated and agreed that the corrected verdict of the jury in this cause, filed September 18, 1913, and appearing at Page 372 of the bill of exceptions, contains, among other things, the following:

The total amount of benefits assessed against property in the benefit district is $76,980.98.

None of the property of the defendants, appellants herein, was taken for the widening of Sixth Street, and none of said defendants were paid damages for property so taken; but, the property of all of said defendants, appellants herein, was assessed benefits as follows:

Property of

	Federal Investment Company	$1,103.20
	Union Pacific Railroad Company	2,960.81
	St. Louis & Kansas City Land Company	907.76
57½	Chicago, Burlington & Quincy R'd Co.	62.01
	Hannibal & St. Joseph Railway Co.	200.63
	Hannibal & St. Joseph Railway Co. and Chicago, Burlington & Quincy Ry. Co., combined, were assessed	2,574.54
	Kansas City, St. Joseph & Council Bluffs R'd Co.	43.71
	Kansas City, St. Joseph & Chicago R'd Co.	16.16
	Kansas City, St. Joseph & Council Bluffs Ry. Co. and Chicago, Burlington & Quincy Ry. Co., combined were assessed	2,484.49
	Chicago, Rock Island & Pacific Railway Company	872.03
	Union Depot Bridge & Terminal Railroad Company	4,086.31
	The Missouri Pacific Railway Company	4,590.28
	Kansas City Stock Yards Company of Missouri	4,728.24
	Edgewater Terminal Railway Company	211.47
	State Line Improvement Company	1,286.62
	St. Louis & San Francisco Railroad Company	3,687.35
	The Chicago & Alton Railroad Company and The Kansas City, St. Louis & Chicago Railroad Company combined were assessed	2,134.68

58 EXHIBIT "G."

It is hereby stipulated and agreed that the original verdict in said cause, appearing at page 290 of the bill of exceptions, contains, among other things, the following:

None of the property of the defendants, appellants herein, was taken in said proceedings for the widening of Sixth Street; but, the property of all of the defendants, appellants herein, was assessed benefits under said proceeding.

That the total amount of damages assessed for property taken in said proceedings was $166,299.57.

That the total amount of benefits assessed in said proceedings was $166,299.57 including amount assessed against the city.

That the property of the defendants, appellants herein, so assessed with benefits under said original proceeding, is as follows:

Property of

Federal Investment Company	$5,153.02
Union Pacific Railroad Company	2,478.58
St. Louis & Kansas City Land Company	610.80
Chicago, Burlington & Quincy Railroad Company; Chicago, Burlington & Quincy Railway Company; Hannibal & St. Joseph Railway Company; Kansas City, St. Joseph & Council Bluffs Railroad Company combined were assessed	9,158.78

Chicago, Rock Island & Pacific Railway Company.....	471.80
Union Depot Bridge & Terminal Railroad Company....	300.17
The Missouri Pacific Railway Company.....	4,359.12
Kansas City Stock Yards Company of Missouri.....	3,063.99
Edgewater Terminal Railway Company.....	328.04
State Line Improvement Company.....	261.20
St. Louis & San Francisco Railroad Company.....	4,904.52
The Chicago & Alton Railroad Company.....	1,769.73
The Kansas City, St. Louis & Chicago Railroad Company	2,396.49

KANSAS CITY, MISSOURI,
By —— ——, *City Counsellor.*

—— ——,
For Defendants.

59 *Bill of Exceptions.*

Be It Remembered, That on Monday, the 9th day of October, 1911, at 9:30 o'clock A. M., and at the September Term, 1911, of the Circuit Court of Jackson County, Missouri, at Kansas City, in Division No. 3 thereof, the above entitled cause coming on to be heard before the Honorable Thomas J. Seehorn, Judge of said Circuit Court, and a Jury duly summoned, the following proceedings were had, to-wit:

(Before the jury was sworn or empaneled, or any proceedings were had on the hearing).

Mr. Rees Turpin: If we are going to take any steps in this proceeding, we think this is the place to begin before the jury is sworn.

Mr. I. N. Watson: I want to make an objection to any proceeding under this supplemental proceeding, for the reason that the ordinance is not sufficient on its face, in that it does not specify any errors or defects sought to be remedied, that is, it does not point out or specify the errors or omissions which it is sought to be corrected by this proceeding; neither does it specify the property to be taken, or the property in the Benefit District, but refers that question to a prior ordinance; therefore, the ordinance, on the face of the proceedings, is not sufficient. The ordinance does not properly describe what pieces of property were omitted or failed to be assessed in the former proceedings, and it does not specifically point out what errors were in the former proceedings but, it simply states that it was made to correct errors and omissions in the former proceedings, without naming them. And, for the further reason that a bill was brought in this Court by the Union Pacific Railroad Company to enjoin the collection of any tax under that proceeding, the ordinance specified in the first proceeding. That proceeding was heard in this Court on January 23rd, 1911; and, the court adjudged the proceeding null and void for want of notice, and enjoined the city from collecting any assessment thereunder — *cess* of law and the equal protection of the law, and we now ask, for the Union Pacific Railroad Company, for full protection of the Fourteenth Amendment of the Constitution of the United States,

and of the Constitution of the State of Missouri; that if the City had complied with the charter provisions and given notice in the first instance, the Union Pacific Railroad Company would have had a right to contest the amount of damages awarded to the property owners in that first proceedings; yet, by reason of the fact that the City failed and neglected to comply with the charter provisions to give notice—notice to the Union Pacific Railroad Company, in the first instance—the Union Pacific Railroad Company is deprived of the right to be heard upon its share of the awards under
60 the charter; and, in and by such proceedings, it permits the City to violate the provisions of the charter, and takes from this defendant the right to be heard on the question of damages in the first instance, and have its protection in and by virtue of the Fourteenth Amendment of the Constitution of the United States; and, the defendant, the Union Pacific Railroad Company, now invokes the protection of the Fourteenth Amendment of the Constitution of the United States against this supplemental proceedings, for the further reason that it deprives the Union Pacific Railroad Company of its property without due process of law, in this: That it has property within the benefit district and property to be assessed, and that in and by virtue of the original proceedings brought, before any damages is entitled to be awarded — for property taken or benefits assessed against the Union Pacific Railroad Company, it is entitled to notice of such proceedings, and is entitled to have a hearing in court on the question of the amount of damages awarded for property taken and for which benefits are assessed against its property; and that by a judgment of this court, the original proceedings have been pronounced null and void for want of notice, as against the Union Pacific Railroad Company; and that thereby the court found that no notice was given to the Union Pacific Railroad Company as provided by the charter provisions of Kansas City —and that the Union Pacific Railroad Company never has had its day in court to be heard upon the question of damages which should be assessed for the property owners, and for which benefits are assessed against its property; and that in denying its such right to be heard, and such right to question the award, the court is taking defendant's property without due process of law, in violation of the Constitution of the State of Missouri, and also in violation of the Fourteenth Amendment of the Constitution of the United States; and defendant invokes both the provision of the Constitution of the State of Missouri and the Fourteenth Amendment of the Constitution of the United States as its legal right from any assessment of benefits, until said Union Pacific Railroad Company has had a chance and opportunity to be heard upon the amount of damages that shall be awarded to property owners and the benefits assessed against it—as provided by the charter of Kansas City, in the original proceedings.

The Court: Now, gentlemen, let it be understood that the attorneys will be permitted to indicate in the bill of exceptions any specific or particular section of the Constitution of the United States or the State of Missouri, that they desire to include in the bill of exceptions.

Mr. Watson: I want to make the further objection to the introduction of any evidence under this supplemental ordinance—for the reason that the ordinance is so vague and indefinite that it does not describe any property which has been omitted in the original proceedings, as required by the charter—and, that it is necessary that the specific pieces of property sought to be assessed with benefits should be set out and described in the supplemental ordinance in order to give this court or any court jurisdiction to hear and determine any proceedings thereunder.

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Mr. Langworthy: I want to make all the same objections, both as to the constitutional questions and the validity of this ordinance, on behalf of the Chicago, Burlington & Quincy Railway Company and the Chicago, Burlington & Quincy Railroad Company, the St. Louis & Kansas City Land Company, St. Joseph & Council Bluffs Railroad Company and Hannibal & St. Joseph Railway Company.

Mr. Ball: The defendant, Federal Investment Company, adopts all of the above objections just made by the Union Pacific Railroad Company.

Mr. Lyons: The Missouri Pacific Railway Company adopts all of the same objections.

The Court: Let the same objections apply to all of the defendants.

Mr. Morse: I wish to adopt the same objection on behalf of the St. Louis & San Francisco Railroad Company, the Kansas City Stock Yards Company and the State Line Improvement Comp-ny.

Mr. Turpin: Does the same objection apply to all of the defendants?

The Court: Yes, sir.

Mr. Wendorff: That same ruling will apply in the progress of the trial, and save each defendant objecting separately?

The Court: Yes, sir. The objections will all be overruled.

To which ruling and action of the court the defendant, Union Pacific Railroad Company, and the other defendants, severally, by their counsel, then and there duly excepted.

Mr. Petherbridge: The City first offers in evidence the original ordinance of Kansas City, Missouri, No. 3209, approved October 19, 1909, which is entitled: "An Ordinance to open and widen Sixth Street from the east line of Bluff Street to the west line of Broadway and repealing Ordinance No. 1750, entitled 'An Ordinance to open and widen Sixth Street from the east line of Bluff Street to the west line of Broadway,' approved July 14, 1909."

Mr. Ball: The defendant Federal Investment Company objects to the introduction of Ordinance No. 3209, for the reason, first, that it appears from the said ordinance that the property proposed to be condemned by it, is between Bluff Street and Broadway, and that the Benefit District prescribed in said ordinance is the State Line on the west, the Missouri River on the north, Twentieth Street on the south and Forest Avenue on the east—and the Benefit District is unreasonable on the face of the ordinance; second, because said ordinance, in Section I thereof, provides as follows: "The amount allowed for private property taken shall be wholly raised by special

assessments made against the property described in the next
32 succeeding section in accordance with Article VI of the Charter of Kansas City, Missouri," whereas, the Charter of Kansas City in force at the time of the passage of the ordinance provides that the cost and amount of damages allowed for property taken should in the first instance be assessed against the City at large, insofar as the jury might find the City benefited; and the balance, if any, alone, shall be assessed against private property in the Benefit District; and, the ordinance is void because it does not conform to the Charter, and its provision quoted, and, it fails to comply with the law under which the council was acting.

The Court: Do you want that objection to apply to all the defendants, gentlemen?

Mr. Langworthy: Yes, sir, I do.

The Court: Let the record show that the objection applies on behalf of all the defendants represented in the case. It will be overruled.

To which ruling and action of the court the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Frank F. Brumback: I object to the introduction of — against the defendant Union Pacific Railroad Company; and, the Union Pacific Railroad Company contends that this is not a supplemental proceeding, and can not remedy that proceeding, which was adjudged illegal and void; and, that it is not such a proceeding as is contemplated by Section 23 of Article VI of the Charter of Kansas City, under which proceeding is sought to be held. And, I also make the same objection on behalf of H. G. Kaill, George S. Graham, Clifton La Force and Felix La Force.

Mr. H. M. Langworthy: I want to make the same objection on behalf of the Chicago, Burlington and Quincy Railroad Company, the Chicago, Burlington & Quincy Railway Company, the Hannibal & St. Joseph Railway Company, St. Joseph & Council Bluffs Railroad Company and St. Louis & Kansas City Land Company.

Mr. Langston Bacon: I make the same objection on behalf of myself and on behalf of Martha E. Bacon.

Mr. R. E. Ball: For the Federal Investment Company, I adopt the objections before stated; and, further object because the original ordinance in this proceeding is void on its face, for the reason that it does not provide for or authorize the assessment of any benefits against the city. I object, for the further reason that the Municipal Court, in the original proceedings, acquired no jurisdiction under the proceeding; and, the verdict and judgment in said original proceeding was void; that, therefore, any ordinance undertaking to supplement those proceedings would be void, for the reason that there was nothing valid to supplement.

Mr. Watson: I also adopt the objections made by Mr. Ball.

The Court: All objections overruled.

63 To which ruling and action of the Court the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

Here the court adjourned the further hearing of this cause, to empanel jury, until Monday, the 16th day of October, 1911, at 9:30 o'clock A. M.

Monday, October 16th, 1911, 9:30 A. M.

On Monday, the 16th day of October, 1911, at 9:30 o'clock A. M., the court adjourned the further hearing of this cause until Monday, the 30th day of October, 1911, at 9:30 o'clock A. M.

Monday, October 30th, 1911, 9:30 A. M.

On Monday, the 30th day of October, 1911, at 9:30 o'clock A. M., the hearing of this cause was resumed and the following further proceedings had, to-wit:

(Additional summons jurors sworn and examined)

Thereupon, after due examination by court and counsel, the following jurors were selected and sworn to try said cause, to-wit: John W. Swope, D. M. Goodrich, J. A. Gresham, M. F. Simmons, J. Ed. Jewell and James E. Johnston.

(After exhibition of maps, ordinances and statements to jury)

Here the court adjourned the further hearing of this cause, for trial until Monday, the 20th day of November, 1911, at 9:30 o'clock A. M.

* * * * * * *

Mr. Watson: The question has been raised whether this is a proceeding under this charter, and whether it should not be pointed out what particular property is to be taken. It doesn't point out any property to be taken.

The Court: That might make it illegal. It ought to be broad enough to bring in all the parties.

Mr. Watson: I want this thing broad enough to get at it (reading from ordinance). Now, I think the ordinance should set out what property has been omitted, and what defect is in it—so that it may be corrected.

Mr. Schaich: The City—As far as the defect is concerned we have set that out in the ordinance. It was absolutely impossible in the ordinance to set out each piece of property where the assessment was not made. We have worked over it a week; and, we think the ordinance is sufficient.

(After further discussion between court and counsel.)

Mr. Watson: I object to any testimony under this ordinance, for the reason that it does not specify what pieces or parcels of property are taken or sought to be assessed under this proceeding—and, it is not proper to refer to the original ordinance for the purpose
64 of eking out or helping out this ordinance, for the reason, that this ordinance must be complete in itself. And, I also make the same objections that were made at the time of the empanelling of the jury, that this original ordinance itself is void—No. 3209—for the reason that it is violation of Section 23, of Article VI of the City Charter.

Mr. Miller: On behalf of the Chicago & Alton Railroad Company

and the Kansas City, St. Louis & Chicago Railroad Company, I join in that objection.

Mr. Langworthy: I make the same objection on behalf of the Chicago, Burlington & Quincy Railroad Company, Chicago, Burlington & Quincy Railway Company, the Hannibal & St. Joseph Railroad Company and the St. Louis & Kansas City Land Company; and, I also desire to join in the renewal of all the motions at the time of the empanelling of the jury.

Mr. Ball: And I join in all of the objections on behalf of the Federal Investment Company and the Edgewater Terminal Company.

Mr. Miller: I want to join in all the objections on behalf of the Chicago & Alton Railway Company and the Kansas City, St. Louis & Chicago Railroad Company.

Monday, April 28th, 1913—9:30 A. M.

On Monday, the 28th day of April, 1913, at 9:30 o'clock A. M., and at the March term, 1913, of said Circuit Court, the court resumed the hearing of this cause and the following further proceedings were had, to-wit:

The Court: Suggestion of death of James H. Sternberg is made by legal heirs and devisees, who now enter appearance and file answer.

(After discussion between court and counsel.)

The Court: Proceed with the evidence, gentlemen.

Mr. Brown Harris: I understand Your Honor to rule, that we couldn't dismiss as to those parties that have already paid?

The Court: I will instruct the jury in regard to those that have already paid—if it will answer the same purpose.

Mr. Harris: Very well.

Thereupon Kansas City, to sustain the issues upon its behalf, then offered evidence oral and documentary in the words and figures following:

(Witnesses here sworn by clerk.)

Mr. Watson: The Union Pacific Railroad Company now objects to the introduction of any evidence under this petition, under this proceedings, for the reason that it appears from the record that no valid notice was given to the Union Pacific Railroad Com-
65 pany of the original proceedings brought; and, that upon a hearing of this court, this court enjoined the collection of any assessment under said proceedings; and, for that reason the same is null and void—and that no notice has been given the Union Pacific Railroad Company of the existence of such proceedings; and that to debar the Union Pacific Railroad Company from a hearing at this time on the question of damages and the assessment of benefits to be assessed against the Union Pacific Railroad Company, and the amount of damages awarded to property owners for which damages shall be assessed; deprived the defendant company of its property without due pro— that ordinance, because the ordinance provides

that all of the benefits to be assessed for the payment of the property taken shall be assessed against the property in the Benefit District prescribed; and it omits to provide that any part of the benefits to be assessed shall be assessed against the City generally; and this is in direct opposition to Section 3 of Article VI of the Charter of Kansas City.

The Court: Let the record show that the objection applies to all the defendants represented. The objection will be overruled.

To which ruling and action of the court the defendant, Frank F. Brumback, and the other defendants, severally, by their counsel then and there duly excepted.

Said Ordinance No. 3209, so offered in evidence, was marked Exhibit "1," and is in the words and figures following, to-wit:

EXHIBIT "1."

"An Ordinance to open and widen Sixth Street from the east line of Bluff Street to the west line of Broadway and repealing ordinance No. 1750, entitled "An Ordinance to open and widen Sixth Street from the east line of Bluff Street to the west line of Broadway," approved July 14, 1909.

Be it Ordained by the Common Council of Kansas City:

Section 1. That Sixth Street from the east line of Bluff Street to the west line of Broadway, be opened and widened, the boundary lines of which are more particularly described as follows, to-wit:

Beginning at a point on the west line of Broadway one hundred (100) feet south of the northwest corner of Sixth Street and Broadway; thence west one hundred (100) feet south of and parallel to the north line of Sixth Street to the east line of Bluff street; thence northeastwardly along the east line of Bluff street; to the southeast corner of Sixth Street and Bluff street; thence east along the south line of Sixth Street to the west line of Broadway, thence south to beginning.

And all private property within said limits is hereby taken and condemned for public use as a part of Sixth street and just compensation therefor shall be assessed, collected and paid, according to law. The amount allowed for private property taken, shall be wholly raised by special assessments made against the property described in the next succeeding section in accordance with Article VI of the charter of Kansas City, Missouri.

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Section 2. The common council determines and prescribes the limits within which private property shall be deemed benefited by the improvements herein proposed, and be assessed and charged to pay compensation therefor, as follows, to-wit:

Beginning at the intersection of the center line of the main channel of the Missouri River with the State line between Missouri and Kansas, produced from the south; thence south along said State line and said State line produced, to the southwest corner of the northwest quarter (¼) of the northwest quarter (¼) of Section seven (7), Township forty-nine (49) Range thirty-three (33); thence

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east along the south line of said quarter (¼), quarter (¼), and said line produced, to the east line of Allen Avenue; thence to the southwest corner of lot two hundred and sixty-seven (267), block five (5), Resurvey of Whipple's Second Addition; thence to the southeast corner of lot one hundred and eighty-six (186) in said block; thence to the northwest corner of lot two hundred and thirty-nine (239) block two (2) in said addition; thence to the northwest corner of said lot; thence to the northwest corner of lot fifty-four (54) in said block; thence to the northeast corner of said lot fifty-four (54); thence to a point in the west line of Mercier Place, where it is intersected by the center line of Twentieth (20th) Street, produced from the east; thence east along the center line of Twentieth (20th) street to the center line of Forest Avenue north of Twentieth (20th) street; thence north along the center line of Forest avenue to the center of Independence Avenue; thence east along the center line of Independence Avenue to the center line of Forest Avenue north of Independence Avenue; thence north and northwardly along the center line of Forest Avenue and said line produced to the center line of the main channel of the Missouri River; thence along the center line of the main channel of the Missouri River to the beginning.

Section 3. Ordinance No. 1750, entitled "An Ordinance to open and widen Sixth Street from the east line of Bluff street to the west line of Broadway," approved July 14, 1909, is hereby repealed, and all ordinances or parts of ordinances in conflict with this ordinance are, insofar as they so conflict, hereby repealed.

Mr. Petherbridge: I next offer in evidence the original ordinance of Kansas City, Missouri, No. 7539, approved February 8, 1911, entitled "An Ordinance providing for authorizing and directing the institution, carrying on and maintaining of supplemental proceedings to properly assess benefits against certain pieces and parcels of land included within the benefit district prescribed by Ordinance No. 3209, approved October 19, 1909."

67 (Said ordinance here marked Exhibit "2," for identification.)

Mr. Ball: The defendant, Federal Investment Company, objects to the introduction of ordinance No. 7539, for the following reasons: First, because the Benefit District prescribed in the original ordinance No. 3209, referred to in said ordinance, is unreasonable on its face, and, invalid for that reason. Second, because the said supplemental ordinance does not comply with the provisions of Section 23 Article VI of the City Charter, pursuant to which it purports to be enacted, in that it fails in any way to specify what errors, omissions or defects it proposes to correct, and fails to point out or specify any tract or parcel of land within the Benefit District in reference to which the City claims that there was any error, defect or omission in regard to the assessment of the same; and, said so-called supplemental ordinance is therefore so vague, indefinite and uncertain, and standing in the position of the pleading of the City in the case, it does not state facts sufficient to constitute a ground or basis for supplementing the original proceeding because, it does

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not point out in any respect wherein the original proceeding needs supplementing and correcting.

Mr. Watson: The Union Pacific Railroad Company adopts all the same objections; and also wants to object to the introduction of the supplemental ordinance, on the ground that if said ordinance be permitted to stand and the City be permitted to assess benefits under such proceedings, it violates the Constitution of the State of Missouri and also the Fourteenth Amendment of the Constitution of the United States, in that it deprives the defendant, Union Pacific Railroad Company, of its property without due process of law, in that it denies the defendant, Union Pacific Railroad Company of any hearing under ordinance No. 3209, under which the value and damages of property taken is assessed, and in which assessment to pay the same has been assessed in part against the Union Pacific Railroad Company; and it deprives it of the equal protection of the law within the meaning of the Fourteenth Amendment of the Constitution of the United States; and, the defendant, Union Pacific Railroad Company, now invokes the protection of the Constitution of the State of Missouri, which prohibits the City from taking the property of the defendant without due process of law; and also invokes the Fourteenth Amendment of the Constitution of the United States, which prohibits the City from taking and depriving the defendant of its property without due process of law, and on a hearing in the court, without the right to be heard to protest its interests; and, also denies it of a hearing in a Court of Justice, which is provided by the Charter, and by the section in the original proceeding, in violation of the Section 2 of the Charter, Article VI; and by failing to give notice to the defendant, Union Pacific Railroad Company, as provided in Section 2, under the proceedings held, and under ordinance No. 3209, the City has denied the Union
68 Pacific Railroad Company of the equal protection of the law, and has taken its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States and the Constitution of the State of Missouri.

Mr. Ball: The Federal Investment Company adopts the added objection made by the Union Pacific Railroad Company.

Mr. Langworthy: Does the same ruling apply, that Your Honor has made?

The Court: Yes, sir. Objections overruled.

To which ruling and action of the court the defendant, Union Pacific Railroad Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Brumback: I make the further objection, that this ordinance, as offered, does not cause to be instituted or conducted, as to any particular piece or pieces of private property sought to be assessed, in the like manner and with like effect as in the original proceedings, because, the ordinance does not describe any particular piece or pieces of property which are to be assessed in this proceeding, but merely attempts to refer for such description to other proceedings, which, in regard to this defendant, are void and of no effect; and, I also object to the ordinance, because, under the Charter of

Kansas City the City is required to pay the costs and expenses of conducting the proceeding; and, as the Charter so provides, this ordinance contemplates the appropriation or payment of some money, and it does not appear that upon its second reading it was referred to any Appropriation Committee of the House in which the ordinance was introduced, nor, does it appear that the Committee obtained the endorsement thereon of the City Comptroller to the effect that sufficient unappropriated money stood to the credit of the fund or revenue account to meet the requirements of such ordinance, and that the same was then in the treasury—all, contrary to Section 2 of Article III of the Charter of Kansas City.

Mr. Langworthy: I want to adopt all of the same objections on behalf of Chicago, Burlington & Quincy Railroad Company and the other companies I represent.

The Court: The objections will be overruled.

To which ruling and action of the court, the defendant, Frank F. Brumback, and the other defendants, severally, by their counsel then and there duly excepted.

Said ordinance No. 7539 of Kansas City, Missouri, so offered in evidence, was marked Exhibit "2," and is in the words and figures, following, to-wit:

69 EXHIBIT "2."

"An ordinance providing for, authorizing, and directing the institution, carrying on, and maintaining of supplemental proceedings to properly assess benefits against certain pieces and parcels of land included within the benefit district prescribed by ordinance No. 3209, approved October 19, 1909.

Whereas the Common Council of Kansas City, Missouri, passed an ordinance entitled "An Ordinance to Open and Widen Sixth Street, from the East line of Bluff Street to the West line of Broadway and repealing Ordinance No. 1750 entitled 'An Ordinance to Open and Widen Sixth Street from the East line of Bluff Street to the West line of Broadway,' approved July 14, 1909," which said ordinance was numbered 3209 and was duly approved October 19, and

Whereas proceedings were instituted under said ordinance in the Municipal Court of Kansas City to condemn the land in said ordinance described and a verdict was rendered in said Municipal Court and

Whereas by reason of certain errors, defects and omissions certain assessments were made against land in the benefit district prescribed by said ordinance which cannot be enforced or collected and certain pieces of private property in the benefit district were omitted and not assessed by said verdict and

Whereas in order to pay the total amount of damages awarded for land taken and damaged by said condemnation it was and is necessary and required that said certain pieces and parcels of land shall be assessed if they are deemed benefited by the jury.

Now therefore be it ordered by the common council of Kansas City:

Sec. 1. That the Mayor and City Counselor are hereby authorized and directed to institute, carry on and maintain supplemental proceedings to properly assess against any piece or parcel of private property within the benefit district prescribed in ordinance No. 3209, approved October 19, 1909, against which an assessment was in the first proceeding wrongfully made or which was omitted to be made, the proper amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement, such amount to be determined by the verdict of a jury in such supplemental proceedings as provided by Article 6 of the Charter of Kansas City.

Sec. 2. Nothing in this ordinance contained shall be held to limit the scope of such supplemental proceedings but such proceedings shall be deemed to be for the purposes authorized by Article 6 of the Charter of Kansas City.

70 Sec. 3. Such supplemental proceedings shall be begun in Division No. One of the Municipal Court of Kansas City and shall be known and described as supplemental proceedings for the purposes specified in said ordinance numbered 3209.

Sec. 4. All ordinances or parts of ordinances in conflict with this ordinance are insofar as they conflict with this ordinance hereby repealed.

Mr. Petherbridge: The City next offers in evidence the published copy of the order of publication in the supplemental proceedings and the proof thereof, under which the original supplemental proceedings were taken.

(Said paper marked Exhibit "3," for identification.)

Mr. Watson: The defendant, Union Pacific Railroad Company, objects to the introduction of this notice in evidence, for the reason that it is so vague, indefinite and uncertain in its description of the property sought to be assessed that it does not constitute notice, or any notice, as required by law, and, does not constitute notice sufficient to bring the Union Pacific Railroad Company within the jurisdiction of this court; and any proceedings based upon such notice, and any assessment against this defendant, Union Pacific Railroad Company, based upon such notice violates the Fourteenth Amendment of the Constitution of the United States, in that it is taking property without due process of law, in that there is no proper notice given of the property sought to be assessed in this case as required under the Charter of Kansas City, and, the defendant, Union Pacific Railroad Company, invokes the protection of the Fourteenth Amendment of the Constitution of the United States. And, the defendant, Union Pacific Railroad Company, also objects to this notice, because it does not set out the pieces or parcels of land sought to be assessed by this supplemental proceeding, as required by the Charter, and does not constitute notice against any person, as required by the City Charter.

Mr. Ball: The Federal Investment Company adopts all of the

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objections made by counsel, and objects, further, for the reason that it does not appear at the time this proof was issued that there was anything to supplement.

Mr. Watson: It further appears from the records of this court, in a proceeding in which the City was a party—that said original proceedings had already been adjudged null and void, and the assessment under Ordinance No. 3209, before this supplemental proceedings were had and instituted.

The Court: I don't understand that objection.

Mr. Watson: We enjoined the City from making any collection under this original proceeding, Ordinance No. 3209.

The Court: That is the way the matter came before me originally.

71 Mr. Watson: We are making our objection, because it is set up in our answer:

The Court: The objection will be overruled.

To which ruling and action of the court the defendant, Union Pacific Railroad Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Langworthy: I want to adopt the same objections on behalf of the Chicago, Burlington & Quincy Railroad Company and the other defendants I represent.

The Court: Gentlemen, all objections apply to each individual defendant represented. It is not necessary to mix up the proceeding.

Mr. Langworthy: That will be so understood, then?

The Court: Yes, sir. Objection overruled.

To which ruling and action of the court the defendant, Chicago, Burlington & Quincy Railroad Company, and the other defendants, severally, by their counsel then and there duly excepted.

Said published copy of Order of Publication and Proof of Publication, so offered in evidence, marked Exhibit "3," is in the words and figures following, to-wit:

EXHIBIT "3."

"Affidavit of Publication.

STATE OF MISSOURI,
County of Jackson, ss:

Elbert E. Smith of lawful age, being first duly sworn on his oath, says that he is one of the publishers of The Daily Record, a newspaper published daily (except Sundays) in Kansas City, Jackson County, Missouri, and doing the city printing on the day of the first publication of the following notice; that the notice to property owners (a true copy of which is hereto attached) was duly published in each issue in the daily edition of said newspaper for four (4) successive weeks, beginning on February 14, 1911, and ending on March 13, 1911, on the following dates:

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February 14-15-16-17-18-20-21-22-23-24-25-27-28 March 1-2-3-4-6-7-8-9-10-11-13 being volume 47 and numbers 38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61 of said paper covering in all a period of 28 days, and in computing the number of days during which said publication was made, Sundays and legal holidays and all calendar days between the first and last publication were included and counted whether or not said paper was published on such days.

(Signed) ELBERT E. SMITH.

72 Subscribed and sworn to before me this 13 day of March, 1911, and I certify that I am duly qualified as a notary public, and that my commission expires February 25th, 1913.

[Harold A. Smith, Notary (Seal) Public, Jackson County, Missouri.]

HAROLD A. SMITH,
Notary Public in and for Jackson County, Missouri."

Attached to said Affidavit of Publication is the following printed notice:

"In the Municipal Court of Kansas City, Division No. 1.

Condemnation.

Supplemental.

Notice to Property Owners.

In the Matter of the Supplemental Proceedings to Open and Widen Sixth Street from the East Line of Bluff Street to the West Line of Broadway, under Ordinance No. 3209, Approved October 19, 1909.

Now on this eighth day of February, A. D. 1911, comes John G. Schaich, Assistant City Counselor, and shows to the Court that heretofore the Common Council of Kansas City, Missouri passed an ordinance numbered 3209 and entitled: "An ordinance to open and widen Sixth Street from the east line of Bluff Street to the west line of Broadway," which said ordinance was duly approved on October 19, 1909; that thereafter proceedings were instituted in the Municipal Court of Kansas City before a jury to ascertain the compensation for the property so taken and damaged and to make assessments to pay for the same, and that thereafter said jury returned its verdict into the Municipal Court; that by reason of certain errors, defects and omissions in said verdict certain assessments were made against land in the benefit district prescribed by said Ordinance No. 3209 which could not be enforced or collected and certain pieces of property in the benefit district were omitted and not assessed by said verdict; that the Common Council of Kansas City passed an Ordinance entitled "An ordinance providing for, authorizing and

directing the institution, carrying on and maintaining of supplemental proceedings to properly assess benefits against certain pieces and parcels of land included within the benefit district prescribed by Ordinance 3209, approved October 19, 1909," which said Ordinance was numbered 7539 and was duly approved on the 8th day of February, A. D. 1911; that a certified copy of said Ordinance was duly filed in the office of the condemnation clerk of this Court and thereupon and upon the petition of the Assistant City
73 Counselor of Kansas City, this Court makes the following order herein, to-wit:

To all persons whom it may concern, Greeting:

Whereas, there was passed by the Common Council of Kansas City, Missouri, Ordinance No. 7539, entitled: "An Ordinance providing for, authorizing and directing the institutions, carrying on and maintaining of supplemental proceedings to properly assess benefits against certain pieces and parcels of land included within the benefit district described by ordinance No. 3209, approved October 19, 1909," which ordinance was approved and took effect on the 8th day of February, A. D. 1911; and

Whereas, Section 1 of said ordinance provided as follows, to-wit: "That the mayor and city counselor are hereby authorized and directed to institute, carry on and maintain supplemental proceedings to properly assess against any piece or parcel of private property within the benefit district prescribed in Ordinance No. 3209, approved October 19, 1909, against which an assessment was in the first proceeding wrongfully made, or which was omitted to be made, the proper amount such private property, exclusive of improvements thereon, is benefited by the proposed improvement, such amount to be determined by the verdict of the jury in such supplemental proceedings, as provided by Article VI of the charter of Kansas City."

The property taken and condemned for public use as a part of Sixth Street as set out and described in said Ordinance No. 3209, Approved October 19, 1909, is as follows:

"Beginning at a point on the west line of Broadway 100 feet south of the northwest corner of Sixth Street and Broadway; thence west 100 feet south of and parallel to the north line of Sixth Street along to the east line of Bluff Street; thence northeastwardly along the east line of Bluff Street to the southeast corner *if* Sixth Street and Bluff Street; thence east along the south line of Sixth Street to the west line of Broadway; thence south to beginning."

The property contained in the benefit district as described in said ordinance No. 3209, being as follows:

"Beginning at the intersection of the center line of the main channel of the Missouri River with the State line between Missouri and Kansas, produced from the south; thence south along said State line and said State line produced, to the southwest corner of the northwest quarter (¼) of the northwest quarter (¼) of Section Seven (7), Township Forty-nine (49), Range Thirty-three (33); thence east along the south line of said quarter (¼) quarter (¼), and said

line produced, to the east line of Allen Avenue; thence to the southwest corner of Lot Two Hundred and Sixty-seven (267),
74 Block Five (5) Resurvey of Whipple's Second Addition; thence to the southeast corner of Lot One Hundred and Eighty-six (186) in said block; thence to the northwest corner of Lot Two Hundred and Thirty-nine (239), Block Two (2) in said addition; thence to the northeast corner of said lot; thence to the northwest corner of lot fifty-four (54) in said block; thence to the northeast corner of said Lot Fifty-four (54); thence to a point in the west line of Mercier Place, where it is intersected by the center line of Twentieth (20th) Street produced from the east; thence east along the center line of Twentieth (20th) Street to the center line of Forest Avenue north of Twentieth (20th) Street; thence north along the center line of Forest Avenue to the center of Independence Avenue; thence east along the center line of Independence Avenue to the center line of Forest Avenue north of Independence Avenue; thence north and northwardly along the center line of Forest Avenue and said line produced to the center line of the main channel of the Missouri River; thence along the center line of the main channel of the Missouri River to the beginning."

"Now, therefore, you, and each of you, are hereby notified that the 17th day of March, 1911, at 2 o'clock P. M. is the day, and the Lower House Council Chamber on the fourth floor of the City Hall Building on the southeast corner of Fourth Street and Main Street, in Kansas City, Jackson County, Missouri, is the place fixed for empanelling a jury to properly assess against any piece or parcel of private property within the benefit district above described against which an assessment was in the original proceedings wrongfully made or which assessment was omitted to be made, the proper amount such private property exclusive of the improvements thereon is benefited by the proposed improvement.

And the court further orders that a copy of this order shall be published in The Daily Record, a newspaper at this time doing the city printing for four successive weeks, the last insertion to be not more than one week prior to the day set for said hearing.

A true copy of the original order.

CLARENCE A. BURNEY,
Judge of the Municipal Court of Kansas City, Division 1.
U. S. WEARY,
Clerk of the Municipal Court of Kansas City, Division No. 1.
CLARENCE J. TRIGG,
Condemnation Clerk, Municipal Court.
38-61."

75 Mr. Petherbridge: The City next offers in evidence original ordinance of Kansas City, No. 8805, approved June 7, 1911—entitled, "An ordinance to confirm the verdict and proceedings in a certain matter under Ordinance No. 7539," of Kansas City,

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Missouri, from which the appeal was taken—from which confirmation of the verdict an appeal was taken to this court.

Mr. Ball: We object to that for the reason heretofore assigned, and for the further reason that no valid proceeding is shown on which to base it.

The Court: You can not inject the question of res judicata in this case by mere objection.

Mr. Watson: I have set that out in my answer.

The Court: Well, objection overruled.

To which ruling and action of the court the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

Said Ordinance No. 8805, so offered in evidence, was marked Exhibit "4," and is in the words and figures following, to-wit:

EXHIBIT "4."

"In the Municipal Court of Kansas City, Division Number One.

KANSAS CITY, Mo., May 31st, 1911.

To the Honorable Common Council.

Gentlemen: I herewith submit for your consideration the verdict and proceedings taken and had by the City under Ordinance No. 7539, entitled:

An Ordinance providing for, authorizing and directing the institution, carrying on and maintaining of supplemental proceedings to properly assess benefits against certain pieces and parcels of land included within the benefit district prescribed by Ordinance No. 3209, approved October 19th, 1909," * * * approved February 8th, 1911.

Respectfully,

(Signed) C. J. TRIGG,

Condemnation Clerk, Municipal Court of Kansas City."

"An Ordinance to confirm the verdict and proceedings in a certain matter under Ordinance Number 7539, approved February 8th, 1911, and entitled: "An Ordinance providing for, authorizing and directing the institution, carrying on and maintaining of supplemental proceedings to properly assess benefits against certain pieces and parcels of land included within the benefit district prescribed by Ordinance 3209, approved October 19th, 1909.

Be it Ordained by the Common Council of Kansas City:

Section 1. That the verdict and supplemental proceedings reported to the common council May 31st, 1911, by the condemnation clerk of the Municipal Court, Division number one thereof, rendered and taken in causing to be ascertained and assessed by a jury, bene-

fits against any piece or parcel of private property within the benefit district as described and set forth in an ordinance of Kansas City, Missouri, Number 3209, entitled: "An Ordinance to open and widen Sixth (6th) Street from the east line of Bluff Street to the west line of Broadway," which ordinance was approved on the 19th day of October, 1909, against which property an assessment of benefits was in the first proceedings (under said Ordinance Number 3209) wrongfully or erroneously made, or which assessment was omitted to be made, the proper amount such private property, exclusive of—improvements thereon, is deemed benefited by the proposed improvement, as specified in Ordinance Number 7539, approved February 8th, 1911, and entitled: "An ordinance providing for, authorizing and directing the institution, carrying on and maintaining of supplemental proceedings to properly assess benefits against certain pieces and parcels of land within the benefit district prescribed by Ordinance Number 3209, approved October 19th, 1909," be and the same are hereby confirmed.

Section 2. The private property condemned and taken for public use as a part of said Sixth (6th) Street, as set out and described in said Ordinance Number 3209, approved October 19th, 1909, is as follows:

Beginning at a point on the west line of Broadway one hundred (100) feet south of the northwest corner of Sixth (6th) Street and Broadway; thence west one hundred (100) feet south and parallel to the north line of Sixth (6th) Street to the east line of Bluff Street; thence northeastwardly along the east line of Bluff Street to the southeast corner of Sixth (6th) Street and Bluff Street; thence east along the south line of Sixth (6th) Street to the west line of Broadway; thence south to beginning.

Mr. W. J. McELLEREN, called as a witness on the part of Kansas City, having been duly sworn testified as follows:

Direct examination by Mr. Petherbridge:

Q. State your name, please?
A. W. J. McElleren.
Q. Do you hold any official position in the City of Kansas City, Mo.?
A. Yes, sir.
Q. What is it?
A. Title of Court Clerk, in charge of condemnation mat-
77 ters and grading matters, in the different Divisions of the Circuit Court and the Municipal Court.
Q. You are a member of the engineering department?
A. Yes, sir.
Q. Has the City made a map or plat of the benefit district in this case——
A. (Interrupting.) Yes, sir. We have such a map.
Q. Wait a minute—I didn't finish my question. Has the engineering department of Kansas City, Missouri, made a map or plat

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of the benefit district in this case, showing the property to be condemned and taken for public use, and also the land in the benefit district to be assessed with the cost of such condemnation?

A. Yes, sir.

Q. With the names of the owners of each tract of land?

A. Yes, sir.

Q. I hand you this bound volume of maps, and ask you to state whether or not that is the map or plat of the benefit district made by the engineering department of Kansas City, Missouri, in this matter? (handing witness bound volume.)

A. Yes, sir; it is.

Mr. Petherbridge: The City offers this map or plat in evidence. (Said map or plat here marked Exhibit "5," for identification.)

Mr. Ball: If the court please, we object to the introduction of this map of the benefit district offered in evidence, for the reason that it purports to bear on various and numerous tracts, with the word "Paid" stamped on it; and, we object to that as not being, in the first place, the competent way of proving what has been paid; and, in the second place, it is incompetent to show on this hearing anything about what has or has not been paid.

Mr. Petherbridge: Your Honor, that will be followed up by other testimony from the City Treasurer's Office, showing exactly what has been paid, and why it is indicated on this other map.

The Court: The map is no evidence whatever. It may be a matter of convenience. The jury will disregard the map, insofar as it indicates the payment of benefits.

Mr. Petherbridge: Until it is further explained.

The Court: The jury will disregard the map in that respect; and, they will follow the evidence irregardless of what the map shows.

Mr. Ball: I further object to page 20 of the map—for the reason that it appears therefrom that a very considerable portion of the property purported to be condemned is taken from the west Terrace Park, heretofore condemned and paid for as a public park; and, we object to it for the reason that it is incompetent for the City to take and condemn any part of a public park, which is paid for by the City or the Park District, for this highway or trafficway or whatever you may call it, and add it to Sixth Street, it having been condemned for one public purpose under the Charter.

78 Mr. Lee: This map is intended for the benefit district.

Mr. Ball: I don't care. Page 20 shows that; and, shows you have taken a lot of West Terrace Park.

The Court: You mean, the Park is included in the benefit district?

Mr. Ball: No, sir.

Mr. Lee: This map is not intended for the purpose of showing the land taken; and isn't evidence of the land taken.

Mr. Ball: Page 20 shows that the forty foot strip from Broadway to Bluff Streets embraces quite a considerable strip of West Terrace Park.

Mr. Petherbridge: We are not seeking in this proceeding to condemn this land twice.

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The Court: I understand. The objection will be overruled.

To which ruling and action of the court the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted. Said bound volume of Maps so offered in evidence, marked Exhibit "5" is in the words, figures, lines and drawings following, to-wit:

(This Exhibit is covered by the stipulation printed as the part of the record herein.)

(By Mr. Lee:)

Q. Let me ask you a question, Mr. McElleren. On this map which you have testified shows the benefit district; there are various places here on the map where the word "paid" is stamped in red ink: That is not a part of the original map made up showing the benefit district—those words "paid"?

A. They were not on the map at that time, no, sir.

Q. You don't pretend that they were made up by the Engineer's Office?

A. No, sir.

Q. And is this the same copy of the map of the Benefit District which was delivered to the City Treasurer's Office, for the purpose of having indicated thereon what benefits had been paid?

A. It is.

Cross-examination by Mr. Ball:

Q. Mr. McElleren, when was that map made?

A. Well, Judge, I don't understand what part of the map you mean.

Q. All of it, any of it?

A. Well, the original map—the sheets of the map were all made at the time the proceedings were first begun.

Q. The original sheets?

A. Yes, sir.

Q. At the time the original proceedings in the Municipal Court were begun?

A. Yes, sir.

Q. Well, what other, or else or further was done to it by the Engineer's Department, afterwards?

A. Well, nothing except just simply to get more of them, if it was necessary to get them, which we did, to have the amount paid and unpaid stamped on it by the City Treasurer's Office.

79 Q. I mean, as far as the map is concerned, there was nothing further done with it?

A. I don't see what other thing was necessary to be done.

Q. Well, was there anything done?

A. No, sir.

Q. These maps are like those in the original proceedings?

A. Yes, sir; except the amounts marked on there.

Q. Except what the treasurer put on there?

A. Yes, sir.

Q. You have been City engineer how long, Mr. McElleren?

A. I never was City Engineer.

Q. I mean, Assistant City Engineer.

A. Oh, I have been in the City Engineer's Office a number of years.

Q. About twenty years, isn't it?

A. About eighteen years—something like that.

Q. You are well acquainted with Sixth Street, from Broadway to Bluff, aren't you?

A. Yes, sir.

Q. And since you have been connected with the City Engineer's Office, how often has that street been paved?

A. Oh, a great many times.

Mr. Petherbridge: I object to that as immaterial.

The Court: Let him answer.

(By Mr. Ball:)

Q. Mr. McElleren, you know that it is a fact, isn't it, that the Union Depot is about to be transferred from its present location? That is, the new Union Depot will shortly be occupied for Union Depot purposes?

A. Yes, sir.

Mr. Petherbridge: I object to that as immaterial.

The Court: It doesn't make any difference.

To which ruling and action of the court, the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Ball: We propose to show, as bearing on the reasonableness of this ordinance—which we have pleaded—that the use of this street in the future will not be anything like it has been in the past; and, that there is no necessity to go to such great expense in widening it. I think we have a right to show that. That addresses itself particularly to Your Honor's determination.

The Court: Well, let him answer.

Mr. Lee: The question of the propriety of widening of this street, is a question for the Council.

The Court: It is a question, however, whether the damages exceed the benefits. I think it is competent.

Mr. Ball: And, also, on the question of the property in the Benefit District.

The Court: Proceed.

(By Mr. Ball:)

Q. Now how much, heretofore, of the passenger traffic to and from the Union Depot has come by the way of Sixth Street? I mean, about what proportion of it?

A. Well, a great deal of it. All of it, except what has went by the street car and elevated lines. The cab service, and things
80 coming up town, would all come that way; but a good deal of the passenger service would go by way of the Eighth Street tunnel line and the Fifth Street line. But, the cab service and things of that kind, would come up Sixth Street.

Q. Isn't it true, that for a great many years heretofore, as long as you have known this Street, that nearly all of the vehicle passenger service, public and private, between the Union Station and the various parts of Kansas City, have come up out of the West Bottoms by way of Sixth Street?

A. A great deal of it, yes, sir.

Q. And isn't it true—that when they move the Union Depot to its new location, that all of that traffic will be removed from Sixth Street?

Mr. Petherbridge: I object to that as immaterial.

The Court: Let him answer.

A. I will say, yes, as far as the passenger service is concerned; but as to the freight traffic, I think there will be an increase.

Q. But the baggage and express service and passenger service——

A. (Interrupting.) Yes, sir; that would be transferred to the new location.

Q. There will be no passenger station left down there?

A. I think not.

Mr. Lee: We object to th[illegible]s calling for a conclusion.

The Court: That will be sustained. In that same connection, however, I understand that the C. B. & Q. in course of time, are to keep a passenger station there.

To which ruling and action of the court the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Ball: Down there by the bridge.

The Court: Now, this land was a donation, according to my own knowledge.

Mr. Ball: Is Your Honor taking judicial notice of that?

The Court: No; but that is the reason why this objection will be sustained. It is a matter of general knowledge, that this property was a donation to the C. B. & Q. Railroad.

To which ruling and action of the court the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Ball: I object to that being put into the record.

The Court: I am only giving my reason for sustaining the objection. I am not stating it as a fact.

To which ruling and action of the court the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

(By Mr. Ball:)

Q. Is there any other passenger station down in the West Bottoms, railroad passenger station, now used, or has there been for many years, except the Union Station?

81 Mr. Lee: I object to that as immaterial.

The Court: Let him answer.

A. No, not that I know of.

(By Mr. Ball:)

Q. Now, do you know, Mr. McElleren, whether the freight depots will hereafter be different ones located in different parts of the city, that heretofore were located altogether and conducted in the West Bottoms? I don't know whether you know about that?

A. Well, in the north end there is a freight station to be built at Second and Lydia Avenue, taking care of all that freight that naturally went south, it will be taken to the north. Just where those freight stations will be built in the West Bottoms, I don't know.

Q. There is one to be built at Second and Lydia?

A. Yes, sir.

Q. That is eastwardly from this locality?

A. Yes, sir.

Q. And it is in the Northeast Bottoms?

A. Yes, sir. All that freight is to go by the north side, instead of going to the south.

Q. After the establishment of a freight station there, none of that hauling would ever go through Sixth Street, would it?

A. No, nothing that would ever go there, no.

Q. Do you know whether there is any freight station to be established in the southern part of the city?

Mr. Lee: I object to that, as asking the witness to state what the railroad plans are for the future. I don't know that they even know their own plans. It don't prevent them from having others.

Mr. Petherbridge: The City further objects to the question, as calling for a conclusion of the witness.

The Court: Yes.

To which ruling and action of the court the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Ball: If he knows those plans. It can be proven by competent evidence.

The Court: Yes, by competent evidence.

Mr. Ball: Of course, if he don't know, I don't want him to say it. Does Your Honor rule that he can't answer that?

Mr. Lee: I object to it for the further reason, that it is not the best evidence.

The Court: Read that question.

(Last question read by stenographer.)

The Court: That objection will be sustained.

To which ruling and action of the court the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

(By Mr. Ball:)

Q. Well, you are familiar with the Twelfth Street Trafficway proposition, are you not?

A. Yes, sir.

82 Q. In a general way, Mr. McElleren, what is that proposed traffic way there at Twelfth Street?

Mr. Petherbridge: The City objects to that as calling for a conclusion of this witness, and, asking for information upon a subject which the witness has not as yet been asked whether he knows anything about it, and, it is immaterial.

(By Mr. Ball:)

Q. Isn't it a fact, Mr. McElleren, that the City proposes to proceed at once with the construction of a double deck viaduct from Wyoming Street to Broadway, and join the City by way of Twelfth Street to the West Bottoms?

Mr. Petherbridge: I object to that as immaterial, and calling for a conclusion of the witness.

The Court: Let him answer.

(By Mr. Ball:)

Q. And a trafficway east and west across the City?

A. Why, yes, there is such a thing under way, I understand. The contract hasn't been let for it.

Q. But it is a matter of completed preparation at present, isn't it?

A. Yes, it is under way. It has not been finished yet.

Q. The lands for the construction of the viaduct have been acquired and paid for?

A. Yes, sir.

Mr. Petherbridge: The City objects to that as immaterial.

The Court: Overruled.

(By Mr. Ball:)

Q. The damages for changing the grade of Twelfth Street and the intersecting streets have been paid for?

Mr. Petherbridge: The City objects to that for the same reason.

The Court: Overruled.

A. No, not at this time.

(By Mr. Ball:)

Q. They have been paid into court?

A. That money is now being collected.

Q. I am not talking about the assessments. The damages have been paid?

A. Yes, sir, the damages have been paid.

Mr. Lee: The damages have not been paid yet.

Mr. Ball: They have been paid into court, all right.

The Court: I think not. That case was tried in this court, and it was only determined by the Supreme Court only a day or two ago.

Mr. Ball: They have got twenty years in which to pay those assessments; but, the money for the damages has all been paid.

The Court: If he knows that to be a fact.

(By Mr. Ball:)

Q. That is a fact, isn't it, Mr. McElleren?
A. That is true, yes, I think.

Mr. Petherbridge: I move to strike that out. The record is the best evidence of what has been paid into court.

The Court: There ought not to be any dispute about that. That matter is well known.

83 Mr. Petherbridge: I am objecting to this testimony as immaterial.

Mr. Ball: That is all right. But the money has nearly all been paid in. All the damages have been paid for, and all the damages for the grading have been paid for. That is true, Mr. Petherbridge, isn't it? Of course, your objection that it isn't the best evidence is another matter.

Mr. Petherbridge: You are getting him to concede a matter.

Mr. Ball: I say, waiving your objection of its competency, that is a fact?

Mr. Wendorff: You don't intend to require us to put in all of the records, do you?

Mr. Lee: It is not a fact.

(By the Court:)

Q. Have you examined the books with reference to these payments, Mr. McElleren?
A. No, sir.

The Court: Objection sustained.

To which ruling and action of the court the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Ball: Without waiving anything—can't we agree on that, for brevity sake—that the lands taken for this viaduct have been all paid to the people to which they were awarded; and, that the damages allowed to people for the change of grade of Twelfth Street and the intersecting streets, have long ago been deposited in the court for their benefit—and save whatever opposition you have to it—I don't want you to waive anything about that?

Mr. Petherbridge: No, that first statement isn't correct. All the damages haven't been paid for the land taken, and not all the damages for the different change of grade.

Mr. Ball: You mean, they haven't all been drawn down?

Mr. Petherbridge: No.

Mr. Ball: But they have been paid into court for the owners?

Mr. Petherbridge: Not for all the grading done, no.

Mr. Ball: They were paid directly to the people, were they?

Mr. Petherbridge: Such as called for them. I know of quite a number—over $55,000 of the land damage—that have not been paid yet.

Mr. Ball: There is $315,000 that the City has left from that—any time they called for it.

Mr. Petherbridge: The City is in a position to pay any time they call for it.

Mr. Ball: Well, that will do, then.

The Court: Proceed.

(By Mr. Ball:)

Q. Do you know the plan of this viaduct, Mr. McElleren?

A. No, I have taken no part in the matter of building the viaduct. The engineers for that were Waddell & Harrington.

84 They have charge of the building of the viaduct; and, I am not familiar with the plan.

Q. Well, is there a Twenty-third Street Viaduct also projected?

A. That is only in the preliminary stages.

Q. But, it is projected by the City?

Mr. Petherbridge: I think this is all incompetent—as to when the Twenty-third Street Viaduct may be built.

The Court: I don't think that the Twenty-third Street Viaduct would have anything to do with this at all. That is too remote entirely.

To which ruling and action of the court the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Langworthy: If they build the viaduct, the traffic will go over Twenty-third Street.

Mr. Lee: I object to whether they will ever build the Twenty-third Street Viaduct.

The Court: It is entirely too remote.

To which ruling and action of the court the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Ball: How about Twenty-third Street being in the Benefit District?

The Court: The Council has stated in its own ordinance, that the Benefit District will extend to Twentieth Street. It don't extend to Twenty-third Street. You are objecting now, that Twentieth Street is entirely too far.

Mr. Ball: If it draws the traffic from Sixth Street—it wouldn't be——

The Court: It is entirely too remote.

To which ruling and action of the court the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Petherbridge: There has been nothing in regard to Twenty-third Street done yet; but, there has been a good deal of talk about it. Your Honor will remember—that at one time we submitted them a bond issue and the people defeated it.

Mr. Wendorff: The books are all here, and it is already in evidence, which shows that the lands south are to be assessed of my company and other railroad companies here, way to the south. Now, in regard to this viaduct—if we are permitted to show it—we will show that the freight traffic that goes to our line and our road,

will not go over Sixth Street, but over this other viaduct; and, it goes to the extent of benefits to my client's property—by showing that when this other avenue is opened up, the traffic will not go over Sixth Street at all. It goes to the extent of the benefits; and, goes to show the right of the jury to assess benefits in that vicinity.

85 Mr. Lee: It is simply a dream, yet.

Mr. Wendorff: Whoever hauls to the south—as shown by this map—wouldn't go way north and go up the bluff there. It would have a bearing on this particular piece of property that my client owns. I want to ask the witness in regard to that, and on that theory. It is a matter to go to the jury, as to the extent of the benefits this proposed proceeding would give to my client way over in the West Bottoms, way off.

The Court: Are you prepared, on that theory, to withdraw your objection to the introduction of the ordinance on the ground that the Benefit District is unreasonable?

Mr. Wendorff: No, sir.

The Court: You still insist that property at Twentieth Street isn't benefited?

Mr. Wendorff: I am not talking about Twentieth Street. I am talking—that the avenue of traffic that would flow to and from my client's property, would not go up this way, but would go the other way. My property is over by the State Line. I am not by that other line. I am over by the State Line.

Mr. Lee: You are taking the position that the benefit to your property is one of fact and not of law?

Mr. Wendorff: No, I am not contending that they would distribute the benefits on any theory. I have a right to ask the witness on your theory.

The Court: Where is your property located?

Mr. Wendorff: From Twelfth Street to the State Line, and up from Liberty Street to north of Twelfth Street. It runs down to Twelfth Street. It is right on this Twelfth Street Traffic-way. That is the location of this property; and, it goes to the extent that it will be nearer to going up Twelfth Street and on south, than to go this other way.

Mr. Lee: You are nearer to Twenty-third Street.

Mr. Wendorff: I am not talking about Twenty-third Street.

The Court: You are arguing, now, for evidence concerning Twenty-third Street.

Mr. Wendorff: I think we ought to have a right to show the typography of the country and the property—of all this property which is being assessed by Twenty-third Street.

The Court: Then, you would want to go into the property at Twenty-fifth Street?

Mr. Wendorff: This jury can't consider Sixth Street without considering the other improvements in the town.

The Court: Thirty-first Street will also be improved.

Mr. Wendorff: We will not be in the Thirty-first Street district; but in all probabilities we will be in the Twenty-third Street District.

Mr. Ball: The courts have that right, upon the question of the

unreasonableness of the district. That is the question for
86 the court to determine—and, all the circumstances and conditions that can be shown as the case goes along. The inquiry now, it seems to me, bears on the circumstances and conditions just as they stand now. If the Twenty-third Street proposition is merely in an embryo state, well enough; but, if the preliminary steps have been taken in that regard, then I think it is competent to show it. Not that it is an established fact, like the Twelfth Street viaduct; but, to show the connection with the benefit district, and the topography of the country, and the traveling traffic and all those things—as bearing on that issue.

The Court: I don't think it is competent to go into matters that are not even contemplated.

Mr. Ball: No, if they are "not even contemplated"; I will admit that.

The Court: What might be possible in the future—something that isn't definite in any sense, whatever. The Twenty-third Street viaduct may be abandoned; and, it may not.

Mr. Lee: There are not even any plans to open it.

Mr. Ball: You are testifying, now. I am trying to get the witness to testify about it.

The Court: Well, you can ask him whether anything has been done.

(By Mr. Ball:)

Q. What has been done in respect to the Twenty-third Street Trafficway, Mr. McElleren?

A. I don't know as there has been anything, that is, anything permanent. Some preliminary matters have been talked about a great deal; but, there is nothing permanent that I know anything about—in a permanent way.

Q. Have there been any maps prepared and things of that kind?

A. I think there have been some maps and profiles, as to the grade, is all I know about.

(By Mr. Lee:)

Q. Studies, weren't they?

A. Yes, sir.

(By Mr. Ball:)

Q. Do you know anything about any improvements across the State Line, with a view of connecting with that?

Mr. Lee: We object to that as too remote.

A. Only what I have seen in the newspapers.

Q. Do you know anything about what is known as the Allen Avenue viaduct?

A. Nothing—only what I have seen in the newspapers.

Q. What is the position of Sixth Street along this line of condemnation, with respect to the West Bottoms—in regard to elevation?

A. The property taken, on the south side of Sixth Street?

Q. Yes, sir. What is its elevation?

A. A part of it is way up high—40 or 50 feet above the street, some of the highest of it.

Q. I think you didn't understand my question. Sixth
87 Street, itself, is what elevation above the West Bottoms—the grade of Sixth Street?

A. I suppose that is in the neighborhood of 75 or 80 feet above the city data plan.

Q. Above the West Bottoms. There is a great bluff right at the west end of where this condemnation ends, isn't there?

A. Yes, sir.

Q. And how high is that bluff.

A. About 40 or 50 feet—60 feet, down to the lower level.

Q. And, what if anything is at the west end of that? What is there over there?

A. Railroad yards, and switch tracks and things of that kind—and manufacturing plants and packing houses.

Q. How far is the State Line from the west end of Sixth Street and this bluff?

A. Oh, three-quarters of a mile, about.

Q. How far is Twentieth Street from Sixth Street?

A. About a mile and a half.

Q. And how far is Forest Avenue from Sixth Street and this bluff?

A. I didn't come here prepared to answer all those questions.

Q. Well, come approximately.

A. To get it correct, we would take a forty acre plant and give you the correct distance; but, it is in the neighborhood of a mile and a half from Broadway to Forest. Troost Avenue is a mile from Broadway.

Q. That, roughly, corresponds to this benefit district, doesn't it? The Missouri River on the north——

A. Yes, sir. The Missouri River on the north—Twentieth Street on the south—Forest Avenue on the east and State Line on the west.

Q. State whether or not that embraces—isn't it a fact that that embraces the great bulk of the business section of the City and a good deal of the residence section?

A. Well, it does, both, yes.

Q. Nearly all of the—that is, a great bulk of the business section is north of Twentieth Street and west of Troost Avenue?

A. Yes, sir.

Q. And, of course, east of the State Line?

A. Yes, sir.

Q. How long is this strip that is proposed to be condemned? How far is it from the west line of Broadway to Bluff Street?

A. Well, it is close to about nine hundred feet—all the way through.

Q. How much of West Terrace Park do you take there?

A. The plat I have, shows a forty foot strip of ground from Bluff Street to Broadway—forty feet wide. That is the portion to be taken.

Q. And how long would you say—about nine hundred feet long?
A. That is it, roughly—yes, sir.

(By Mr. Petherbridge:)

Q. He asked you how much of the parkway was to be taken?
A. (Examining plat.) This plat shows it is to be forty feet wide—the width of that. It is not given here, how long.

88 (By Mr. Ball:)

Q. About how long, Mr. McElleren?
A. About 350 feet—something like that.
Q. It takes a strip about 350 feet long by 40 feet wide of West Terrace Park?
A. Yes, sir.

Redirect examination by Mr. Petherbridge:

Q. Mr. McElleren, I don't think you understood one of Mr. Ball's questions, when he asked you about what was beyond Sixth and Bluff. You said down in that Bottoms was railroad yards. What he wanted to get at—or, if he didn't, I do. Does Sixth Street extend down into the Bottoms there? Is it traveled on?
A. No, there is a viaduct that goes over to Kansas City, Kansas; but, Sixth Street ends at that point.
Q. You don't mean for it to get into the record—that Sixth Street comes to an abrupt wall, and that there is a jump-off of sixty feet there. Isn't there any connection from Sixth Street down in the Bottoms, so that teams can get down in there?
A. Yes; they can go by Bluff Street.
Q. Is there any other way of getting down into the Bottoms, besides turning down Bluff Street?
A. I think not.
Q. Well, I went over there the other day in an automobile.
A. Yes, that is what I say.
Q. Isn't there a viaduct that goes over there? Sixth Street doesn't end there at the Bluff, does it?
A. I answered the question, that there is a viaduct to go over to Kansas City, Kansas.
Q. Can't you get down into the West Bottoms of Kansas City, Missouri, by that same viaduct?
A. Sure, you can.
Q. Is there also another street leading across that bridge and down to the Union Depot, from Sixth Street?
A. Not that I know of.
Q. Don't you travel from the Union Depot up over the bridge and then part of the way on Sixth Street?
A. You are talking about going down Bluff Street to Sixth.
Q. I am talking about right at the top of the hill.
A. You have to turn south there, and then go on Bluff Street.
Q. And, another way is to go on the viaduct.
A. Yes, sir.

Q. And then go down off of the viaduct on an incline plane?
A. Yes, there is an incline plane.
Q. I don't want it to get into the record that there is a bluff there. Sixth Street don't stop there?
A. No. Sixth Street stops there; but then, you have the viaduct.

(By Mr. Lee:)

Q. That viaduct is a great stone and steel viaduct a mile and three quarters long, that goes over into Kansas City, Kansas?
A. I have answered that. Yes, sir.
Q. Large enough for a large amount of traffic?
A. Yes, sir.
Q. And it is the most direct route to Kansas City, Kansas?
A. Yes, sir.
89 Q. And there are places leading from that viaduct down to the ground below, in the West Bottoms?
A. I have answered that. That is a fact.
Q. And Sixth Street is the nearest and shortest outlet from the viaduct, in coming up from the Bottoms and leading to the north part of Kansas City? Isn't that true?
A. Yes, sir.
Q. And all this north part of Kansas City—the wholesale district, so far as it exists in the north part of Kansas City, and also the district across the Missouri River, in what is called "North Kansas City," across the Armour-Swift Bridge—that is all connected with the West Bottoms and Kansas City, Kansas, by way of Sixth Street?
A. It is.
Q. And that is the only street, between Fifth Street and Twelfth Street, that you can get to the Bottoms over there—isn't it?
A. I don't understand you.
Q. Isn't Sixth Street the only street between Fifth Street and Twelfth Street which is open to vehicle traffic, to get to the West Bottoms?
A. Yes, that is true.

Mr. Lee: I guess that is all.

Recross-examination by Mr. Watson:

Q. Just one question, Mr. McElleren. Mr. Lee has asked you about that viaduct; they charge you a pretty fine price for traveling over that viaduct, don't they?
A. Yes, sir.
Q. It isn't a free viaduct at all?
A. No, it is a toll viaduct.

Re-direct examination by Mr. Lee:

Q. And Bluff Street, where it connects with Sixth Street, leads by a nice easy grade down to Union Avenue and the West Bottoms generally?
A. Yes, those grades are sufficient for freight traffic. It is used for freight traffic now.

Q. It is the principal traffic street now, and has been for years, from the West Bottoms up to town?
A. Yes, sir.

Re-recross-examination by Mr. Watson:

Q. Mr. McElleren, you have got a map showing the Union Pacific land, haven't you?
A. It is shown in this bound volume.
Q. I wish you would take that and show me where it is—so as to get it in the record.

(By Mr. Lee, interrupting:)

Q. Just on that point I was on: Do you know whereabouts on that bridge the toll station is?
A. No.
Q. You can go to the West Bottoms over that viaduct free, can't you, without paying any toll at all? Isn't the toll station west of where you turn down the incline plane down in the West Bottoms?
A. I don't know.

(By Mr. Watson:)

Q. Now, Mr. McElleren, I wish you would take that map there and turn to that.
A. (Witness indicates on bound volume—Exhibit "5.")

90 Re-re-redirect examination by Mr. Lee:

Q. This Twelfth Street traffic way has two levels, hasn't it?
A. It has a low level and high level, yes, sir.
Q. After the lower level comes up the hill—where does it branch off, and where does it continue to?
A. It starts at Liberty Street—where you get onto the low level; and it branches to the north and south at what we call Beardsley Road. That is the low level of the viaduct.
Q. Where does it lead to on the north?
A. That will lead into Sixth Street.
Q. Is that lower level of suitable grade for heavy teaming?
A. That is what it is designed for. That is the intention of it.
Q. So that, all heavy traffic coming from the West Bottoms by way of the Twelfth Street Trafficway, can come up on that lower level and either go south to Seventeenth Street, or go to the north and come out on Sixth Street.
A. Yes, sir—that is the aim of it.

Re-re-recross-examination by Mr. Watson:

Mr. Watson: If you gentleman are through, I want to ask a few questions.

Q. I wish you would turn to your map, Mr. McElleren, and show the jury where the Union Pacific lands lay in this Benefit District.
A. (Witness indicates on bound volume, Exhibit "5").

COPY BOUND TO

Q. On what map is that shown on?

A. On page 40 of the bound volume. The Union Pacific Railroad Company's land lies north of Twelfth Street and east of the State Line.

Q. Up to what point, east?

A. To Liberty Street.

Q. In what direction does Twelfth Street run, from Liberty Street to the State Line—due west?

A. Southwest.

Q. Now, then, the streets are open—Genessee Street and Wyoming and Liberty Streets, south of Twelfth Street, are all open public streets—are they not?

A. Yes, sir.

Q. Where does the viaduct connect with those streets I have just mentioned?

A. About Seventeenth Street—as I remember it.

Q. And Allen Avenue is a viaduct that leads up grade all the way almost up to the City, isn't it?

A. Yes. It is used a great deal—there is a great deal of traffic over it.

Q. And you say that comes in at Seventeenth and Liberty?

A. About Seventeenth Street.

Q. Now, this Twelfth Street Viaduct starts there at Twelfth and Liberty Streets, does it not?

A. Yes, at Twelfth and Liberty—that is where the Twelfth Street Viaduct ends.

Q. So that, there is this Allen Avenue Viaduct, besides the one on Twelfth Street which they are constructing when it is completed, where you can come up and go south to Seventeenth Street;
91 and the only other freight that would go up from the Union Depot, would be what was intended to go in the north end?

A. What originated on the north?

Q. Yes, sir.

A. Yes, sir.

Q. They propose to establish a number of stations on the Belt Line—freight stations—do they not?

A. Yes, on the Terminal Railway, north and south.

Q. On both sides of the City?

A. There is to be a freight station on the south side, on the Kansas City Terminal Railway, yes.

Q. And freight coming in in carload lots, would come in and be set on the tracks in any part of town where the industry is located?

A. Through freight would come in on the north side.

Q. From the Union Pacific?

A. I suppose all of it would.

Q. From the Union Pacific—wouldn't it come down around the Frisco tracks?

A. It does now.

Q. Well, isn't that the most direct route for freight coming into Kansas City, for Twelfth Street south?

A. I suppose it is.

Q. And the only freight that would come up from the Union Depot, would be what little freight that might come to the north end, north of Twelfth Street?

A. What would be ordered there.

Q. Then, you have the Twelfth Street and the Allen Avenue Viaduct south of that—which would be a better grade than for you to come way round by Sixth Street?

A. I don't know that the grade would be any better.

Q. Well, it would be much nearer. Any freight going to the south of Twelfth Street—it would be better to go the other way?

A. If it was intended to go to the south, it would be better.

Re-re-re-redirect examination by Mr. Petherbridge:

Q. Isn't it a fact, that all of the big wholesale and business interests of the city are now located north of Twelfth Street?

A. Yes—north of Eighth Street—north of Ninth.

Q. And the traffic—the bulk of the traffic that would come up town, would come up by way of Sixth Street?

A. I think Sixth Street will be more used as a traffic street than it is to-day. If the freight is all sent to the north, there will be more freight than there is to-day. It loses the passenger service.

Re-re-re-recross-examination by Mr. Ingraham:

Q. Mr. McElleren, I want to ask you some questions with reference to the Kansas City Stock Yards and the Saint Louis and San Francisco Railroad properties. First, I want to hand you a map, that is a map of Kansas City—having marked on it, in pink, the lands within the Benefit District in this proceeding (handing witness map).

A. Yes, sir.

92 Mr. Petherbridge: That isn't an absolutely accurate drawing, but, it is substantially correct.

Mr. Ingraham: My questions will be such as will not demand an absolutely accurate map.

Q. Now, Mr. McElleren, this part of this map marked in pink, represents that part of Kansas City that is in the Benefit District in this case?

A. Yes, sir, practically so.

Q. The old part of Kansas City lies to the north, or the upper part of this pink area. That is, what is known as "old town"?

A. The original "old town."

Q. And the town, for a good many years has been growing south?

A. Yes, sir.

Q. And east?

A. Yes, sir.

Q. Along about where this big park way is marked (indicating on map) is what we all know as the "bluff," which separates the West Bottoms from the up-town district?

A. Yes, sir.

Q. And down in the West Bottoms, is the heavy business district?

A. The wholesale district, yes, sir. It is what we call the "water level," and is held by the railroads. Yes, sir.

Q. And north of Twelfth Street you say, is the heaviest or most of the wholesale district?

A. In the upper part of town, east of the West Bottoms.

Q. Let us get west—down in the West Bottoms, aren't the wholesale houses there chiefly north of Twelfth Street—the wholesale grocery and implement houses?

A. Yes, sir—the bulk of them are.

Q. Now, there were two ways, up to the time this Twelfth Street Trafficway was devised—there were two ways of getting out of that West Bottoms up into Kansas City—one way was by way of Sixth Street, and the other was by way of Twenty-fourth Street?

A. Yes, sir.

Q. And Sixth Street—if one wants to get out of the West Bottoms by way of Sixth Street, he has to pass through a very congested district in the West Bottoms and over very dangerous grade crossings?

A. Yes, sir—for hauling freight, yes, sir.

Q. And he encounters at and along Bluff Street, in getting away over that street—the freight man encounters a pretty stiff grade, doesn't he?

A. After you get to Bluff Street, and before you get to Sixth Street—the grade, according to my understanding—the greatest part of the grade is getting up to the Sixth Street Bridge.

Q. And along Sixth Street there is some grade?

A. Yes, sir.

Q. And it is a pretty rough road, too?

A. It is paved with stone blocks. That is the only thing that will stand the heavy travel.

Q. In your position as city engineer, you have to go into
93 the matter of grades and traffic generally—don't you?

A. Yes, sir; but I take no part in that.

Q. But there is considerable brought to your notice—the matter of the most feasible grade here and there, to and fro? The engineer's office is appealed to to settle the grade, and so on?

A. Yes, sir.

Q. I want to ask you if it is not a fact, that for several years past the tendency of traffic out of the West Bottoms has been by the way of Twenty-fourth Street, to get out and into Kansas City?

A. Twenty-fourth Street has a great deal of travel. It has had for years—and it has to-day.

Q. Traffic south of Twelfth Street in the West Bottoms desiring to get up into the city, frequently goes by way of Twenty-fourth Street—and, one reason at least, is because it has the Allen Avenue Viaduct, which relieves it of all those grade crossings? It doesn't incur any grade crossings does it?

A. No.

Q. Whereas, if it goes north by way of Sixth Street, it does encounter grade crossings—at Saint Louis Avenue and other places?

A. They have some grade going over that Allen Avenue viaduct.

Q. I am talking about the grade crossings?

A. No—there are no grade crossings.

Q. Now, the property of the Kansas City Stock Yards is in the extreme southwest corner of this Benefit District—where my pencil now rests (indicating on map)?

A. Yes, sir.

Q. And Sixth Street is up here (indicating on map) at the north end of this pink portion of the map?

A. Yes, sir.

Q. Quite a distance and remote from the Kansas City Stock Yards?

A. Yes—it is quite a little ways there.

Q. And the better way for the Stock Yards Traffic—whatever it may be—to get up into Kansas City, is by way of Twenty-fourth Street and the Allen Avenue Viaduct?

A. Yes, sir.

Q. It has little incentive to take the other course. With the grade crossings congested and the north end—it has little incentive to take the Sixth Street route?

A. There may be a portion of the travel that goes that way.

Q. But the general tenor of it is the other way, and has been for many years?

A. I would think that the Twelfth Street Trafficway, and Twenty-third Street and Twenty-fourth Street, would perhaps take care of that traffic just as well as Sixth Street.

Q. Now, as to the Saint Louis and San Francisco Railroad Company's properties. They lie here at the foot of the bluff, and south of Twelfth Street (indicating on map)?

A. Yes, I think they do.

Q. There is no need for streets through a railroad yard, ordinarily—are there, Mr. McElleren—unless there is a big freight station?

A. They have to have streets to get to them.

Q. If there is a big freight station there, we all admit that
94 we would have to have a street to get to it; but as a railroad yard proper, to put cars in and store them and make up trains—there is little need for a street access to such a place—is there?

A. No, I don't think it would need a great many streets.

Q. But we all admit—that if there was a great freight station, we admit that streets would better the property?

A. Yes, sir.

Q. I want to ask you this as an expert, I think, on these matters—because, you have dealt with them for twenty years in such a way that you are certainly able to help the jury get at the best truth of this. If it is true, Mr. McElleren, that the new terminal ordinance, so called—the new Union Depot ordinance, provides that any railroad—the Frisco, for example—which heretofore had the right to

and had laid its tracks into the old depot in the West Bottoms, and down there, and that teams were compelled to come there and haul up this grade, wherever it might happen to go, but if this depot ordinance so provides that a shipper of freight into Kansas City either over the Frisco System or any other, has a right to insist that that freight shall not be stopped at that depot, but on the contrary, that the Terminal Company and the other companies constituting the Terminal Company shall build sub-freight stations, one at Second and Grand, and another at Lydia Avenue and Second Street, and another in the East Bottoms at about Chestnut Street, and another at or near Sheffield, and another one at Fifteenth and Askew, and another one at Twentieth and Main—at which all shippers can have their freight delivered in carloads or less than carload lots, without any added charge. I want to ask you if that doesn't relieve the necessity of ways and means to reach those freight houses down in the West Bottoms; and won't it relieve the congestion in the West Bottoms?

A. Well, I would say it would. There are so many of these substations to be built; and I haven't become familiar with all of them. At present, I know there are some on the south side, along the industrial tracks of the Terminal Company. I know there are some freight stations to be built there, and some on the north side, but I am not familiar with them all.

Q. As to the Stock Yards—you know as a matter of common knowledge in going about the city in your city work, that the Stock Yards Company ships its cattle and live stock by freight in and out of Kansas City, and places it at the chutes to the packing houses?

A. Yes, sir.

Q. So that, the business of the Stock Yards does not lead to any great freight hauling to and from it by freightmen?

A. No, it has no freight—except matters of feed and things of that kind. That is about all I know they would use.

Q. In other words, the Kansas City Stock Yards, or its patrons, would have very little need for the use of Sixth Street—whether it is widened, or as it is now?

A. I wouldn't say as to that.

95 Q. Isn't it your best judgment, that its business is such that it doesn't use Sixth Street?

A. Its business is all shipping in and out in cars—not by wagon.

Mr. Ingraham: We offer this map in evidence.

Said map so offered in evidence was marked Exhibit "A," and is in the words, figures, lines and drawings following, to-wit:

(It is agreed by stipulation that original Exhibit A, is to be produced at the hearing it not being practicable to print the same.)

Re-re-re-recross-examination by Mr. Wendorff:

Q. Mr. McElleren, the wholesale houses that you have been talking about; a great deal of that business never comes up town, does it?

A. There is a great deal of through freight.

Q. Yes. But, a great deal of that that isn't through freight. It is a distributing point—and it never comes up town?

A. Yes, a great deal of it.

Q. Where is the property of the Chicago, Rock Island and Pacific Railway Company located, Mr. McElleren?

A. I couldn't tell you without looking at the map.

Q. Will you look at your map and tell us, please.

A. Yes—if I can find it (witness examines map, Exhibit "5"). Well, the property of the Chicago, Rock Island and Pacific Railway Company is located south of Twelfth Street and north of Sixteenth Street and between Genessee and Wyoming—a portion of it.

Q. Do you know what street the Rock Island freight house is located on?

A. No, I do not. It is in that territory.

Q. It is at Fourteenth and Wyoming, isn't it?

A. (Examining map) Yes.

Re-re-re-recross-examination by Mr. Langworthy:

Q. Mr. McElleren, I want to ask you one or two questions about the Burlington property; and I have a map here——

(Map here marked Exhibit "B" for identification.)

Q. (Continuing:)—which shows the location of the Burlington properties, and the Saint Louis and Kansas City Land Company's properties, the Burlington properties being marked with red; and the Land Company's properties being marked with yellow. Now, it is a fact, is it not, that a very large portion of the property owned by the Burlington is right at and around Twelfth Street—as shown by this map?

A. (Examining map.) North and south of Twelfth Street—yes.

Q. And it has tracks running from Twelfth Street clear down to the southern limits of the Benefit District—at Twenty-third Street?

A. Well, the Benefit District only goes to Twentieth Street.

Q. No, the Benefit District goes to Twenty-third Street, at or near the State Line?

A. Well, it is a little irregular. It makes a jog there.

96 Q. Yes. And the largest portion at the south end, is at Twentieth Street?

A. Yes, sir.

Q. But, it runs to Twenty-third Street,—so as to take in the Burlington tracks clear up to Twenty-third Street. Now, the part of the Burlington property right at Twelfth Street, and just south of Twelfth Street, is the part occupied by the freight depot? Isn't that true?

A. Yes, sir.

Q. And that part just north of Twelfth Street, is the part occupied by its shops and roundhouses?

A. Yes.

Q. Now, there is quite a large tract of the Saint Louis and Kansas

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City Land Company's property, clear down to Twenty-third Street. In fact, most of it is clear down to Twenty-third? Is it not?

A. This plat shows that one portion of that is in the Benefit District—yes, sir.

Q. Then, there is a small portion of this Saint Louis and Kansas City Land Company's property north of Fourth Street, and down near the river?

A. They have some land in there—yes—just about at Broadway.

Q. Is there any access to this property lying north of Third Street, I will say, between Third Street and the river? Has that property any access to Sixth Street?

A. Well, you can go from Third and Broadway to Fourth Street, on Broadway; and you could get down to Sixth Street.

Q. Yes. But, to get up town from the property between Third and the river—there would be no use made of Sixth Street, would there?

A. Well, it is hard to tell. If you wanted to go that way, you could go that way. If you had no business to send that way.

Q. Are there any roads or streets running through this tract of land, except between Third and the river—so that in going from this tract, you could come up to Sixth Street and get up town? You would have to go clear down to Eighth Street and along the bluff, and then back up to Sixth Street—wouldn't you?

A. Yes, you would have to do that.

Q. And there are no streets connecting with Sixth Street, so you could come up Sixth Street?

A. No.

Q. And so, that property between Third Street and the river would have no use of Sixth Street whatever—would have no occasion to use Sixth Street?

A. If you wanted to go to the West Bottoms, there would be no necessity to go over Sixth Street. You could go down to Bluff Street, and then over the Sixth Street Viaduct.

Q. Yes.

A. This is a way without going on Sixth Street.

Q. That is a way of going to the West Bottoms without the necessity of using Sixth Street—and that would be the most convenient way to go?

A. A great deal of that traffic down there goes over the viaduct, and over Fourth Street and up town. It is used a great deal.

97 Q. Yes. Now, the freight house of the Burlington is just south of Twelfth Street, on this tract of land shown in red—isn't it—which belongs to the Chicago, Burlington and Quincy Railroad Company?

A. I am not familiar with this plat.

Q. This plat is made to show the location of the Saint Louis and Kansas City Land Company's property and the Burlington property. I had an agreement with Mr. Petherbridge that it should be used. Now, isn't it a fact, that when this Twelfth Street Viaduct is completed, a great deal of the traffic will be brought up over the viaduct in motor trucks?

TO CLOSE IN CENTER

A. In motor trucks, yes—on the lower level.

Q. Isn't the grade such that freight can be brought up over the higher level in motor trucks?

A. Yes, it is possible.

Q. Would the upper grade of the Twelfth Street Trafficway be any steeper than the present grade leading up to Sixth Street now, over the bluff?

A. Well, the high level of the Twelfth Street Trafficway is a trifle over five per cent.

Q. Do you know what the per cent of the grade is leading from the West Bottoms up Bluff Street to Sixth Street, now?

A. No.

Q. You don't know?

A. I can have that information this afternoon for you.

Q. You can get that for us?

A. Yes.

Q. But in your opinion, it would be entirely feasible to carry freight up over the higher level of the Twelfth Street Viaduct—especially, by using motor traucks?

A. Yes.

Q. And that was expected to be done at the time the trafficway was planned?

Mr. Petherbridge: I object to that.

(By Mr. Langworthy:)

Q. Well, the upper level of the trafficway was planned so that it was possible for that to be done?

A. That was the plan—for the heavy traffic to be brought over the low level; and, for the light travel and some portion of it over the higher level.

Q. And all the light travel coming from Twelfth Street in the neighborhood of this property, will naturally go on the Twelfth Street Viaduct on the lower level?

A. Yes, sir.

Q. And some part of the freight will go up over that higher level?

A. It will. I don't think there is any doubt about that.

Q. Now, are you familiar with this ordinance that has been passed, granting to the Kansas City Southern Railway Company the right to switch cars up in the upper part of town, up along May Street and so on?

A. No, sir.

Q. Well, if that ordinance provides and permits them to build tracks up there, in and around the neighborhood of Eighth and May Streets, so that they can switch cars from the West Bottoms up to the neighborhood in and around Eighth and May Streets—then that will also have some tendency to take some of the hauling off of Sixth Street, will it not?

98 Mr. Petherbridge: I object to that as calling for a conclusion. He says that he knows nothing about the ordinance. And, the question put is not a proper hypothetical question.

The Court: I think not.

To which ruling and action of the court the defendants, Chicago, Burlington and Quincy Railroad Company and Saint Louis and Kansas City Land Company, and the other defendants, severally, by their counsel then and there duly excepted.

(By Mr. Langworthy:)

Q. Considering that such an ordinance has been passed, Mr. McElleren—what will be the effect upon the Sixth Street travel?

Mr. Petherbridge: You mean for your road?

(By Mr. Langworthy:)

Q. As far as the travel on Sixth Street is concerned?

A. Of course, that gives them a way on that road to Eighth and May Streets. I know that is the talk there. What effect it will have on Sixth Street, I don't know. I suppose it will continue to be used.

Q. It will reduce the amount of traffic on Sixth Street, won't it?

A. For that particular road, some—perhaps.

Q. Have you made any estimate as to what per cent of traffic will be taken off of Sixth Street by reason of the change in the location of the Union Depot, Mr. McElleren?

A. No.

Q. Have you made any estimate of that at all?

A. No.

Mr. Langworthy: I want to offer this plat in evidence in connection with the cross examination.

Said plat or map so offered in evidence, marked Exhibit "B," is in the words, figures, lines and drawings, following, to-wit:

(It is agreed by stipulation that original Exhibit "B" is to be produced at the hearing, it not being practicable to print the same.)

Re-re-re-recross-examination by Mr. Wendorff:

Q. Mr. McElleren——

Mr. Petherbridge (interrupting): You examined him on the Rock Island, Mr. Wendorff. I want to examine him on some of these others before we get away from them.

Mr. Wendorff: Well, go ahead.

Re-re-re-re-redirect examination by Mr. Petherbridge:

Q. Has the Frisco Railroad a freight station down in the West Bottoms?

A. They have a freight station there some place. I don't know the location of it.

Q. Do you know how far it is from Twelfth Street, north or south?

A. No. I can have that information this afternoon.

Q. Well, now, so far as the Chicago, Burlington and Quincy Railroad Company is concerned—the one that Mr. Langworthy exam-

ined you about. It is the design of the Twelfth Street Trafficway that the heavy traffic and heavy freight shall come up over the lower level—isn't that true?

A. Yes, sir.

99 Q. And then if the freight is intended for the north end of Kansas City—north of Twelfth Street—when they get up to Beardsley Street, it switches around north and will come up Sixth Street?

A. Yes, sir.

Q. And if it was destined south, it could go south to Seventeenth Street?

A. It could.

Q. Now, which would be the nearest way, if they wanted to come up to Twelfth and Main Street- with their loaded freight—which would be the nearest way for them to come when they got to Beardsley Street, to the south or to the north?

A. The shortest way would be to go to Sixth Street, and then up Central or Main.

Q. And that would be just as good a grade as the other way, or better?

A. The grades would be as good.

Re-re-re-re-recross examination by Mr. Ingraham:

Q. Mr. McElleren, when you get to Broadway you strike a pretty good grade south of Sixth Street?

A. Yes, sir.

Q. And it is pretty long grade, too?

A. Yes, it runs south to Tenth Street.

Q. And that is that grade that the street car got away on, isn't it?

A. Yes, sir.

Q. And ran through a saloon?

A. Yes.

Re-re-re-re-re-redirect examination by Mr. Petherbridge:

Q. What I spoke about, was to a point on Tenth or Twelfth Street?

A. They would have to travel some grade.

Q. But if they came around, and had a load of merchandise on one of these heavy wagons, and came up the Twelfth Street Trafficway, and when they got to Beardsley Street they would switch around north to Sixth Street, and then up to Main, and then up on Main to Twelfth Street, wouldn't they?

A. I hardly think they would have to go to Main Street. They would take Wyandotte or some of those other streets—they are as good a grade as Main.

Q. I am talking of Twelfth Street down Main, north to Sixth Street. That is a nice grade, isn't it?

A. Yes, sir. You can come to Delaware on Sixth Street, and then south on Main Street to Twelfth. You could go that way.

Q. I am just taking this one illustration—to see which is the better way. It don't make any difference to me, so we get to Twelfth and

Main Street,—bear that in mind. I want to deliver a big heavy wagon load of stuff from some freight house in the West Bottoms—say the Santa Fe or Union Pacific. They will start up this viaduct on the lower level, and when they get to Beardsley Street they could switch off south and go to Seventeenth and Holly, and go around that way and get up; or they could turn north at Beardsley Street, on the lower level, and go to Sixth Street, and then up to Main, and then up Main to Twelfth, couldn't they?

A. Yes, sir.

Q. Now, which way would be the better way?

A. That would be pretty hard for me to say.

Re-re-re-re-re-recross-examination by Mr. Ingraham:

Q. Now, Mr. McElleren, so far as the Stock Yards and the Frisco Railroad Company are concerned: After the new depot is occupied, and you remove from there that situation—then, there won't be any congestion at Sixth Street, for anything that the Frisco or Stock Yards may need?

A. The passenger traffic will be less, but the freight traffic will be more.

Q. I am talking about the traffic from the Stock Yards?

A. I don't think that will be any different.

Re-re-re-re-re-recross-examination by Mr. Watson:

Q. Isn't the grade, coming in around by Sixth Street up to Twelfth and Main—wouldn't that be just as steep as if you had gone on the higher level on the Twelfth Street Viaduct?

A. There is some grade you will find there as much as five per cent, but not all of it.

Q. And all the wholesale stuff that comes in in carload lots is now switched in down south, isn't it—and it is not taken over this trafficway at all?

A. I don't know about that.

Q. I believe you said that there was a Fourth Street Viaduct also?

A. Yes, sir.

Q. And the heavy traffic comes up there now?

A. Yes, sir.

Re-re-re-re-re-recross-examination by Mr. Lyons:

Q. Mr. McElleren, the Missouri Pacific Railway has a freight depot down at Second and Grand Avenue, hasn't it?

A. Yes, sir.

Q. And freight coming in on that road for firms in the north part of Kansas City is handled at that freight depot at Second and Grand Avenue, isn't it?

A. Well, there is a great deal of freight hauled there, but I don't know just what part of them use that depot at Second and Grand.

Q. You know that the Missouri Pacific Railroad also has some team tracks over there, where they set carloads on the team track, and it is hauled by the freight men from there up town?

A. Yes, a great deal of freight is handled there that way.

Q. Do you know where the Missouri Pacific freight house in the West Bottoms is located?

A. Not exactly. I know that they have a large freight house there.

Q. That is located south of Twelfth Street, isn't it?

A. I think so.

Mr. Petherbridge: Is that all?

Mr. Lyons: Yes. Oh, wait a minute.

101 (By Mr. Lyons:)

Q. Freight coming up town from the Missouri Pacific freight depot in the West Bottoms, would come up over the Twelfth Street Viaduct or go around by the way of Twenty-fourth Street, wouldn't it?

A. You say it would?

Q. Yes. Wouldn't that be the better way of moving freight up town—for teams coming up?

A. It all depends on where you wanted to land it.

Q. Well, assume that the freight for the north end is all handled from the tracks at Second and Grand?

A. A great deal of that freight don't go to Twenty-fourth Street.

Q. And, a good deal of it does go to Fourth Street? That is true?

A. Yes. That would answer for the north end of town.

Q. And that would do away with crossing the tracks of other roads down in the West Bottom to a considerable extent, wouldn't it?

A. That would do away with some of it, yes.

Re-re-re-re-re-recross-examination by Mr. North:

Q. Mr. McElleren, you have looked at page ten of this plat book and noticed the location of the Chicago and Alton freight house in the West Bottoms—haven't you?

A. (Examining plat.) Yes, sir.

Q. Where is the location of the Chicago and Alton freight house, with reference to the West Bottoms end of the Twelfth Street trafficway?

A. It is about three blocks east of Liberty Street and south of Twelfth Street.

Q. Then, with that location, the only logical way for freight to come, either for the north or south end of uptown Kansas City, would be to go out and come over the Twelfth Street Trafficway, either the lower or upper level?

A. It could.

Q. And there would be no reason at all for the traffic to go by way of the West Bottoms—that is, by way of the street levels across the West Bottoms?

A. Not over the lower level of the Twelfth Street Viaduct.

Q. I say, that freight, on account of the proximity of the lower level of the Twelfth Street Viaduct to the Chicago and Alton freight house—that the freight for up town, no matter where it was going, would go over the Twelfth Street Viaduct?

A. It could go that way.

Q. Are you familiar with the freight house of the Chicago and Alton, at Second and Grand?

A. I don't know all of the West Bottoms. I couldn't give you the exact location.

Q. I am talking now, about your knowing and being familiar with the Chicago and Alton freight house at Second and Grand?

A. I do know there is one there.

Q. Do you know the purpose of this freight house?

A. I assume it is for freight purposes.

Q. Assuming that it is used for ingoing and outgoing
102 freight handled by the Chicago and Alton Railroad: Would it be more practicable for freight to be handled at that freight house and delivered to a central point up town—say Twelfth and Main, or Tenth and Main, or any other place which you would call a centrally located point in the retail district—than it would be to handle it at the West Bottoms freight house of the Chicago and Alton—considering the grade and distance, and the roundabout route that would have to be taken from the West Bottoms freight house to get up to the centrally located points up town?

A. I suppose they would have that freight shipped to the most favorable place. I suppose to Second and Grand.

Q. In your opinion, wouldn't it be more practical to handle that freight from the Second and Grand freight house?

A. I think so.

Q. Then, from your understanding of the grade and distances, do you see any way or reason for handling it—for any freight going to the Chicago and Alton or over the Chicago and Alton, or coming in over the Chicago and Alton—any reason for handling it over Sixth Street?

A. It may be you will have a certain amount of freight they won't try to deliver at Second and Grand.

Q. But I am assuming the other way.

A. I am not in the railroad business. I suppose they know.

Q. I say, assuming they can handle that freight at Second and Grand as well as in the West Bottoms, then, wouldn't it be more practical to handle it that way; and, that none of it would go by way of Sixth Street at all?

A. I suppose they could.

Q. And that would be the best way to handle it?

A. I am not in the railroad business.

Q. I am talking about it from a local standpoint—taking a delivery of freight to the freight house, and getting into and coming from the freight house—from the standpoint of people and teamsters. Can you figure out how far it would be from the freight house in the West Bottoms to Tenth and Main or Twelfth and Main—which you say is the shortest way, by way of Sixth Street? Do you know about what distance that would be for a team?

A. I couldn't tell you, except by taking the plans. It would be more in the way of a guess.

Q. Well, I will ask you this way: Wouldn't it be about twice the

distance than from Second and Grand to Tenth and Main—in a straight line?

The Court: Now, you mean the distance across the West Bottoms, do you?

Mr. North: No, sir.

(By Mr. North:)

Q. Wouldn't it be about twice the distance than it would be from Second and Grand, Mr. McElleren?

A. Yes, sir.

103 (By Mr. Petherbridge:)

Q. Have they any freight house in the West Bottoms, Mr. McElleren?

A. Yes, sir.

Mr. North: It is only three blocks from the lower end of the Twelfth Street Trafficway.

Re-re-re-re-re-recross-examination by Mr. Wendorff:

Q. Mr. McElleren, you have spoken about coming north around out of the Twelfth Street Viaduct and coming up Sixth Street. Where does that cross the street car tracks that run on Eighth Street—the main street car tracks that come from Kansas City, Kansas, to Kansas City, Missouri?

A. It would come up this Beardsley Street (indicating on plat).

Q. Where does it cross the street car tracks?

A. I don't think it does—there at Eighth Street.

Q. You can get that information for us—whether it will be on grade or not?

A. Yes, sir.

Q. Here is a map that has been introduced in evidence, Exhibit "B." Can you look at this map and tell us what territory can be reached without going over any grade crossings; and, what other route you could take without going over grade crossings.

A. You mean, to answer that offhand?

Q. Yes, sir.

A. I can't do it.

Q. Can you look at that map and see?

A. Yes. But I think to be an answer I ought to know more about it.

Q. By looking at that plat you have—it has located on it, has it not, the various railroad yards and tracks?

A. Yes; but a man can't take those things up offhand.

Mr. Petherbridge: I understand that this is only a map of the Burlington.

Mr. Wendorff: Use any map you want to.

(By Mr. Wendorff:)

Q. I am trying to get at what amount of territory you can go over from this Sixth Street, without going over grade crossings?

A. I couldn't answer that.
Q. You will look that up for us?
A. Yes.

The Court: Is that all?
Mr. Wendorff: Well, I want that information.
The Court: Let him make it in writing.

Re-re-re-re-re-re-redirect examination by Mr. Petherbridge:

Q. This Sixth Street that we are seeking to widen and open—does it connect with the viaduct that connects the two Kansas Cities?
A. It does.
Q. And isn't the viaduct and Sixth Street the main connection between the two cities?
A. It is.

Re-re-re-re-re-re-recross-examination by Mr. Wendorff:

Q. That viaduct you speak about, is a private enterprise owned and operated by private people, isn't it?
The Court: That is repetition. Gentlemen, I can't give you the time for repetition.

104 THOMAS L. HEALY, called as a witness on the part of Kansas City, having been duly sworn testified as follows:

Direct examination by Mr. Petherbridge:

Q. State your name, Mr. Healy, so the stenographer will get it?
A. Thomas L. Healy.
Q. What position with City of Kansas City, Missouri, do you hold, if any?
A. Deputy in the City Treasurer's Office, in charge of the Special Tax Department.
Q. In charge of the collection of special assessments levied for the purpose of widening and opening streets?
A. Yes, sir.
Q. And have you been in charge of the certified copy of the verdict which was furnished you in this Sixth Street widening matter?
A. Yes, sir.
Q. What was the total amount of damages allowed for land taken in this case, as shown by the verdict?
A. The total amount of damages as shown by the copy of the verdict, amount to $166,299.57.

Mr. Clyde Taylor: There is an objection I want to make. I want to object to the receipt of the testimony of the amount of awards in the preceding case, for the reason that under the ruling of the court that is binding in this proceeding; and that to receive it in evidence as against these parties who are now first brought before the court, is to receive in judgment against them a finding in a case to which they were not parties at the time it was made, and, is to deny them their day in court upon the question of the

amount of damages that are to be awarded, without giving them an opportunity to be heard upon that question. In a general way, the objection goes to the same matters that have already been preserved. I desire at this time to do that.

The Court: It occurs to my mind, that the jury would be unable to determine whether the damages exceed the benefits, if they were not put in possession of all the facts in this case and the former. I don't know how this jury could determine the benefits unless they know what the damages are.

105 Mr. Turpin: Our contention is, what the damages are is to be tried out in this proceeding, because, to deny these parties——

The Court (interrupting): That was my theory about this case. The Supreme Court differs from this court on that subject; and I suppose we will have to be governed by the opinion of the Supreme Court. Objection overruled.

To which ruling and action of the court the defendant, the Chicago Great Western Railway Company, and the other defendants, severally, by their counsel then and there duly excepted.

(By Mr. Petherbridge:)

Q. Has any portion of that amount been paid?
A. Yes, sir.
Q. What amount has been paid?
A. The total benefits collected amount to $89,317.59.
Q. What is the balance still unpaid?
A. The balance still unpaid is——

Mr. Watson (interrupting): I object to that. The matter of the balance unpaid, is a matter for this jury to determine and not the other jury. The amount assessed has nothing to do with this case.

The Court: My understanding is, that the Supreme Court says that this jury could only assess the benefits of the parties who had not recognized the former proceeding.

Mr. Watson: I don't understand that this jury couldn't determine the amount of benefits upon each particular piece of property. The amount which the other jury assessed on any particular property, is not a matter for this jury. The question is, what this particular property is benefited by this proceeding; and, we are not bound to take the distribution of the portion which has already been found, if any has been found. That is what they are asking to do now—take the amount which has already been fixed and spread it over our property. I object to it, for the reason that the jury is to determine the amount assessed against this particular property which has been affected. I object to it for that reason.

The Court: Well, as an original proposition that objection would have been sustained; but in the light of the opinion of the Supreme Court, it will be overruled.

To which ruling and action of the court the defendant, Union Pacific Railroad Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Ball: I object to any proof of what has been paid or has not been paid. This question, as I understand it, relates to the amount that is unpaid on this Municipal Court verdict.

The Court: Yes, sir.

Mr. Ball: I don't think there is anything in either one of those opinions, that would require Your Honor to put in contemplation for this jury to distribute a certain amount of benefits over the property.

106 The Court: I am not going to put that responsibility on this jury.

Mr. Ball: They ought not to be embarrassed by what the other jury found.

The Court: I don't know how this jury can determine whether the damages exceed the benefits, without being in possession of the proceedings in the other case. I don't understand that the Supreme Court said that this court could not determine that issue.

Mr. Ball: Nor I either.

The Court: That issue is in this case.

Mr. Ball: I think so, too. But the Supreme Court did say that Your Honor could not re-try the question of damages.

The Court: Yes. This jury will be bound by what the jury in the Municipal Court did in that respect.

Mr. Ball: Now, it will be for the jury to say whether in their judgment and observation the damages exceed the benefits.

The Court: Yes, sir; the benefits for the entire district.

Mr. Ball: But if this jury is to do that, they have nothing to do with what the Municipal Jury thought about it, or, the unpaid with those paid; so this question of what was paid and what unpaid, and what amounts, it seems to me is immaterial.

The Court: In order to determine whether the damages exceed the benefits, the jury must take in the entire district. Now, this jury is concluded from changing the assessment on the property of parties who recognize the Municipal proceeding.

Mr. Ball: I think they can. The verdict which they appeal from, was the whole question; and I think the whole thing is an open question.

The Court: It don't appear so to me. The objection will be overruled.

To which ruling and action of the court the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Petherbridge: Read the question.

(Last qustion read by stenographer.)

A. The balance still unpaid, is $76,981.98.

(By Mr. Petherbridge:)

Q. Now, Mr. Healy, in looking over the verdict in the original proceedings which was furnished you by the clerk of the Municipal Court did you check off and mark on the map or plat of the Benefit District the various tracts of ground that the owners of which had paid on under that verdict?

A. Yes, sir.

Q. Does this map of the Benefit District show every tract of land upon which payment has been made under the original verdict?

A. Yes, sir.

Mr. Ball: Wait a minute. Give me a chance to object.

The Court: He hasn't another map.

Mr. Petherbridge: The map has been put in evidence, in connection with Mr. McElleren's testimony.

107 The Court: Yes. I presume he wants to put in that objection under the rulings of this morning.

Mr. Ball: I want to object to that question.

The Court: Proceed.

Mr. Ball: The Federal Investment Company objects to that last question, whether this map shows or does not show such tracts as the owners have paid the former assessment on, for the reason that this defendant is entitled in this hearing to all of the rights under the Charter Law that it would have had if it had been brought into the original proceeding in the Municipal Court, and had appealed from the original judgment in the Municipal Court; and under the Charter, it has a right to a finding of this jury as to all of the proportional benefits of its property as compared with all the other property in the Benefit District; and as to this defendant, the finding of the jury in the Municipal Court, or the amount of the payments in paying the amount found in the Municipal Court, have no binding force or effect on this defendant at all; and, it is incompetent for the purpose of ascertaining the benefits that may, if any, be found by the jury accruing to the property of the defendant.

The Court: The objection will be overruled.

To which ruling and action of the court the defendants, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Watson: I want to make the same objection to that, on behalf of the Union Pacific Railroad Company.

Mr. Lyons: And I want to make the same objection as to the Missouri Pacific Railway Company.

The Court: Gentlemen, it isn't necessary to save exceptions or make objections on behalf of each of the various defendants. Every objection that is made applies to each defendant.

Mr. Langworthy: Each defendant that is represented?

Mr. Petherbridge: That applies to each defendant here, that is represented in this hearing?

The Court: Yes, sir. Proceed.

Mr. Petherbridge: Read the last question.

(Last question and answer read by stenographer.)

(By Mr. Petherbridge:)

Q. Was the map so endorsed by you?

A. Yes, sir.

Q. And how did you arrive at it—take the verdict you were collecting upon, and check from that on to that other one?

A. The system was—to take the copy of the verdict from which

we entered the collections, and mark on the plat in evidence the tracts that the verdict shows had been paid upon.

Q. Now, does the map or plat of the Benefit District also show all the other tracts in the Benefit District upon which no payments have been made?

A. As far as that map shows, of the Benefit District, those not marked have not been paid.

108 Q. Is this book—the bound volume of the verdict in this case—the one you had of the district, made from the plat?

A. Yes, sir.

Q. This is the book you used in making the collections?

A. Yes, sir.

Q. And that is a certified copy of the verdict in the original proceedings for the widening of Sixth Street?

A. Yes, sir.

Mr. Petherbridge: We offer that book in evidence, together with the endorsements thereon showing the assessments that are paid.

Mr. Ball: I object to that——

The Court (interrupting): I don't think it is necessary to encumber the record with that.

By the Court:

Q. How many pages are there in that book?

A. 730.

Q. How many different tracts are there on each page?

A. Well, the total is 13,305. They vary—they run from sometimes two to twenty or thirty on a page.

Q. Now, you have compared each one of these tracts as recorded in that book, and made your notations on this map?

A. Yes, sir.

Q. And those notations on the map, are the result of your examination of this verdict?

A. Yes, sir. We took this verdict and ran the tracts that had been paid, and indicated those that had been paid, stamped them "paid" on that plat. When we finished, we checked back from the plat to the verdict.

The Court: Now, offer your plat in evidence.

Mr. Petherbridge: The City, again, offers the plat in evidence with the endorsements thereon and indicated by a rubber stamp mark on the various tracts "paid."

Mr. Ball: We object to that for the reasons heretofore assigned; and further for the reason that this appeal is taken in the supplemental proceeding, and this defendant, the Federal Investment Company, was not in court in the proceedings in which this verdict from which the notations have been taken was rendered, and was not a party to that proceeding; and, the verdict in that proceeding is absolutely incompetent for any purpose as against this defendant; and, further, that there is no showing of what modifications or changes were made in the subsequent supplemental proceedings, so called, in the Municipal Court, from those in the orig-

inal—or when these payments were made—or, whether they were made according to the original verdict or the supplemental verdict.

Mr. Petherbridge: They were made according to the supplemental verdict, I said.

The Court: Don't discuss this question.

Mr. Brumback: On behalf of Hermann Brumback, trustee, I desire to object to the introduction of this, because, it does not appear whether or who were actually bound by the original pro-
109 ceeding, or whether they were served with process. If they were served with process, then they were bound by the original assessment.

The Court: I suppose you intend to introduce the original record, do you not?

Mr. Petherbridge: I have already introduced the original ordinance. This is the original record.

Mr. Brumback: I don't make that objection on my own behalf.

Mr. Petherbridge: I have introduced the original ordinance, and a certified copy of the verdict in the original proceeding.

The Court: What position is Hermann Brumback in?

Mr. Brumback: He paid the assessment.

Mr. Petherbridge: Now, in order that there may not be any question about it, I introduce the original verdict rendered in the original proceeding under Ordinance No. 3209.

Mr. Ball: What is that?

Mr. Petherbridge: That is a certified copy, with the City Treasurer's notations that they were paid.

Mr. Ball: I am not objecting to it because it is a copy; but, because we were not parties to that proceeding.

The Court: He is not objecting on the ground that this witness is testifying to the net amount of this verdict. You have that on your plat. That is sufficient—as far as I understand the law. Objection overruled.

To which ruling and action of the court the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Petherbridge: In order that the record may be kept straight, the city now offers in evidence all the original proceedings in the Municipal Court under Ordinance No. 3209, including the verdict in that case.

Mr. Brumback: I object to that, part of it may be competent, and part of it incompetent.

The Court: Yes, that is too general.

Mr. Lee: I am inclined to think that it would be a good idea to let this record go in evidence for the purpose of checking the descriptions of the various tracts, where they might not appear accurately on the map, or, if there is any question whether they do appear accurately on the map.

The Court: I don't see the necessity of encumbering the record with that. Some of these defendants may want to appeal this case; and, if they had to copy that verdict in the bill of exceptions it would be almost prohibitive. The objection to that is sustained.

Mr. Lee: Well, we offer it in evidence.
The Court: Objection sustained.
Mr. Petherbridge: That is all, Mr. Healy.
110 Said plat, and said original proceedings in the Municipal Court under Ordinance No. 3209, and the verdict in said case, so offered in evidence, are in the words and figures following, to-wit:

(The original Ordinance No. 3209, and notice to property owners is set out in this bill of exceptions at pages 149 to 156, and service of notice and affidavit of publication of notice are fully set forth in the foregoing pages, to-wit, 149 to and including 156.)

Cross-examination by Mr. Ball:

Q. Mr. Healy, in making these memoranda on the map, Exhibit "5," did you pay any attention to the time when the payments were made?
A. As to indicating it on there?
Q. The date, yes.
A. No, sir.
Q. You paid no attention to that?
A. No, sir; not as to marking the plat.
Q. Now, do you know whether any payments were made after the supplemental proceedings in the Municipal Court?
A. My understanding is, that none were made. Our office received an order at the time those proceedings begun, to cease collections; and, no collections were made subsequent to that order.
Q. So that, all collections that were made, were made prior to the supplemental proceedings?
A. Yes, sir.
Q. And no payments have been made since?
A. No, sir.

Redirect examination by Mr. Petherbridge:

Q. You never had a copy of the verdict in the supplemental proceedings?
A. No.
Q. And nothing was ever collected?
A. No, sir.

The Court: Is that all?
Mr. Petherbridge: Yes, sir.
The Court: Stand aside.
(Witness excused.)
Mr. Petherbridge: That is the City's case.
Here Kansas City rested its case.
Mr. Watson: The defendant, Union Pacific Railroad Company, enters a demurrer now to the case made by the City, and asks the court to direct the jury to render a verdict for the defendants, so far as the Union Pacific Railroad Company is concerned, for the reason that upon the face of this record as introduced, the city has

no right to prosecute these proceedings for the reasons heretofore given and objections heretofore made, and, for the further reason, that there is no evidence in this case showing the amount of benefits, or particular benefits to this property; and, there is no evidence by which this jury can determine or ascertain what part of these benefits, if any, could be assessed against this Railroad Com-
111 pany's property, and at what time; and, there is no criterion for this jury to go by and determine between the benefits of the property taken and the benefits of the remaining portion of the district—or what proportion the remaining part would bear to the balance of this District; and, there is nothing by which the jury can arrive at a fair verdict for this property and that taken for the whole district.

Mr. Ball: I join in that request, for the Federal Investment Company.

The Court: I don't remember any testimony was introduced showing that the Benefit District was reasonable.

Mr. Lee: I think that is assumed—unless there is some evidence to the contrary. The council so found it.

The Court: And so fixed it.

Mr. Lee: Yes. The presumption is that it is reasonable, unless there is evidence shown to the contrary.

The Court: The demurrer will be overruled.

Mr. Wendorff: Let the Chicago, Rock Island and Pacific Railroad Company be understood as making the same demurrer.

The Court: Now, gentlemen, these demurrers are on behalf of each defendant in the case. It is not necessary to repeat it. The demurrer will be overruled.

To which ruling and action of the court in overruling said demurrer and in refusing to peremptorily direct said verdict, the defendant, Union Pacific Railroad Company, the other defendants, severally, by their counsel then and there duly excepted.

Defense.

Whereupon the defendants, to sustain the issues upon their behalf, then offered and introduced evidence oral and documentary in the words and figures following:

THOMAS L. HEALY, recalled as a witness, testified further as follows:

Direct examination by Mr. Brumback:

Q. Mr. Healy, by looking at the verdict could you tell me how much was allowed for damages to the tract of land at the southwest corner of Broadway and Sixth, fronting twenty-two feet on the west line of Broadway, and forty feet on the south line of Sixth Street?

A. Give me the plat.

(Plat, Exhibit 5, handed to and examined by witness.)

A. (Continuing:) Is this the tract you want (indicating on plat)?

Q. Yes, sir. That land is twenty-two feet on the south line of Sixth Street, and forty feet on the west line of Broadway?

A. The verdict shows that $11,400.00 damages were al-
112 lowed on the tract of land twenty-two feet front on the south line of Sixth Street, lying west of and adjacent to the west line of Broadway.

Q. And was for the land, alone?

A. Yes, sir.

Cross-examination by Mr. Petherbridge:

Q. What does the verdict show was assessed against the City, on account of this widening and opening of Sixth Street?

Mr. Ball: We object to that question for the reasons heretofore assigned; and for the further reas[illegible] that the jury is not bound by any finding by any previous assessment of benefits in the Municipal Court; that the defendants were not parties to the proceeding in which that was made.

The Court: Objection overruled.

To which ruling and action of the court, the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

A. The verdict shows the City was assessed $3,238.39. This was against the City and the public generally.

Mr. Clyde Taylor: I move to strike out the answer of the witness, because under my theory of the matter that is not any evidence for this jury to consider. This jury, as I understand by the ruling of the Supreme Court, is left to assess any part that it sees fit; and this jury is not entitled to know—it is not competent for them to know what the former jury did as to the assessment of the benefits.

The Court: What do you think about that, Mr. Petherbridge?

Mr. Petherbridge: I think that is just as competent as Mr. Brumback's question.

Mr. Brumback: I don't think so.

The Court: I am not convinced that the City comes within the exceptions prescribed by the Supreme Court.

Mr. Lee: I am inclined to think that the objection is well taken.

Mr. Brumback: Under the decision of the Supreme Court, it may be different as to the amount of damages. That is the issue we want to contest here; and I want to follow that by further proof, and show that the land was not worth it.

Mr. Petherbridge: I didn't hear your question. Was it damages for land taken?

Mr. Brumback: Yes, sir.

Mr. Petherbridge: If that is true, then the city objects to that evidence.

The Court: It is not offered yet. This is only preliminary to what he wants to introduce later.

Mr. Brumback: Yes, sir.

The Court: I am inclined to think that this jury has a right to

assess damages against the City, as well as the former jury. That motion to strike out is sustained—as to the amount of the verdict against the city.

113 Mr. Brumback: Then I call Your Honor's attention, that the original ordinance says that the damages shall be assessed against the property in the Benefit District, and excludes the City.

The Court: That objection has been made and passed on.

Mr. Lee: It doesn't make any difference. The City had a binding judgment.

Mr. Brumback: I just wanted to call Your Honor's attention to it.

The Court: Go ahead, gentlemen.

(Witness excused.)

114 Mr. Turpin: We offer in evidence the original petition in case No. 52,754 in the Circuit Court of Jackson County, Missouri, at Kansas City, entitled, "Union Pacific Railway Company, a corporation, Complainant, vs. M. A. Flynn, City Clerk of Kansas City, Missouri, U. L. Weary, Clerk of the Municipal Court of Kansas City, Missouri. Oscar Hochland, Clerk of the Circuit Court of Jackson County, Missouri, and Kansas City, a municipal corporation, Defendants."

Mr. Petherbridge: The City objects to this offer because it is incompetent, irrelevant and immaterial, and in no way binding upon this proceeding, and it does not prove or tend to prove that the matters in controversy here are res judicata, and the matter of res judicata has not been properly pleaded, and it is not res judicata, because not being the same parties or the same subject matter.

The Court: You will have to reach that by instructions. The objection will be overruled.

Said petition or bill in equity, in cause No. 52,754 so offered in evidence, was marked Exhibit "E," and is in the words and figures following, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 52754.

UNION PACIFIC RAILWAY COMPANY, a Corporation, Complainant,
vs.
M. A. FLYNN, City Clerk of Kansas City, Missouri; U. L. WEARY, Clerk of the Municipal Court of Kansas City, Missouri; Oscar Hochland, Clerk of the Circuit Court of Jackson County, Missouri, and Kansas City, a Municipal Corporation, Defendants.

Bill in Equity.

Plaintiff for its cause of action against the defendants, alleged and avers that it is and was, at all the times hereinafter mentioned a corporation, duly created, organized and existing under and by virtue of the laws of the State of Utah; and is and was at

115 all the times hereinafter mentioned, the owner of the real estate hereinafter set forth and described.

Plaintiff further avers that H. A. Flynn is, and was at all the times hereinafter mentioned the City Clerk of Kansas City, Missouri; and that U. L. Weary is and was at all the times hereinafter mentioned, the Clerk of the Municipal Court of Kansas City, Missouri, and that Oscar Hochland is and was at all the times hereinafter mentioned the Clerk of the Circuit Court of Jackson County, Missouri; and that Kansas City is and was at all the times hereinafter mentioned a corporation, duly organized and existing under and by virtue of a special charter, as provided in and by the Constitution of the State of Missouri.

Plaintiff further alleges and avers that in and by the charter of Kansas City, Missouri, there is established what is known as the "Municipal Court of Kansas City, Missouri," which court had power to hear and determine condemnation proceedings, in which damages and benefits are assessed, to and against real estate in certain prescribed districts.

Plaintiff further avers that at all the times hereinafter mentioned, it was and now is the owner of the following described real estate, in Kansas City, Jackson County, Missouri, to-wit:

Beginning at the intersection of the north line of 12th Street, with the west line of the northwest quarter (¼) of the southwest quarter (¼) of Section six (6), Township forty-nine (49), Range thirty-three (33), thence north on said west line three hundred and forty-four and one-half (344½) feet to the south line of railway lands of the Missouri Pacific Railway Company; thence north fifty-nine (59) degrees and forty-five (45) minutes east along said south line of railway lands to north line of said quarter *quarter* section; thence east on said north line to west line of Liberty Street; thence southerly on west line of said Liberty Street to the north line of 12th Street, thence southwesterly along the north line of said 12th Street to beginning.

Also the following land:

Beginning on the south line of the southwest quarter (¼) of the northwest quarter of Section six (6), Township forty-nine (49), Range thirty-three (33), four hundred and thirty-seven (437) feet east of the southwest corner thereof; thence north fifty-nine degrees (59) and forty-five (45) minutes east, one thousand and forty-seven (1047) feet, thence south to south line of said section, west to beginning, except part taken for Liberty Street.

Also the following lots in Turner & Company's Addition to Kansas City, Jackson County, Missouri; south ten (10) feet of Lot eight (8), Block fifty-two (52), south ten (10) feet of tract sixteen (16) feet wide lying west of and adjoining said lot eight (8), Block fifty-two (52), south ten (10) feet of lot nine (9), Block fifty-two (52); south ten (10) feet of lot ten (10), Block fifty-two
116 (52); south ten (10) feet of Lot eleven (11), Block fifty-two (52); south ten feet of lot twelve (12), Block fifty-two (52); south ten (10) feet to lot thirteen (13) Block fifty-two (52); south ten (10) feet of Block fourteen (14), Block fifty-two (52); south ten feet (10), lot fifteen (15), Block fifty-two (52); south ten (10) feet of lot sixteen (16), Block fifty-two (52).

Plaintiff further shows to this Honorable Court that said Kansas City is a municipal corporation, duly organized and existing under and by virtue of the charter of Kansas City, framed by thirteen free holders, who were elected April 7th, 1908, and which charter was adopted at a special election held on August 4th, 1908, and which charter was and now is in full force and effect within the limits prescribed for Kansas City, Missouri; that under and by virtue of Article VI of said charter, provisions are made for condemning and damaging private property for public use; and in and by said charter, power is given to Kansas City, under certain conditions to take private property for public use, which includes the widening or altering, for public use, any street or alley in said city, and further providing that for all property taken for such public use, just compensation shall be paid the owner or owners of such private property taken or damaged, which shall be ascertained and assessed by a jury of six disinterested freeholders of the city, by proceedings prescribed by ordinance, and as in this chapter provided, or as otherwise provided by law.

Section 2 of said charter provides that when any ordinance shall provide for taking or damaging private property for public use, the city shall by ordinance describe the private property to be taken or damaged, and if the same is to be paid for wholly or in part by special assessments, shall prescribe the limits within which private property shall be deemed benefited by the proposed improvement, and be assessed and charged to pay compensation therefor, and that the court shall make an order naming the day and place fixed for empaneling the jury to ascertain the compensation for the property to be taken or damaged, and to make assessments to pay for the same, which order shall be directed to all persons to whom it may concern, without naming them; that a copy of such order shall be published in a newspaper at the time doing the city printing, for four successive weeks, the last insertion to be not more than one week prior to the day set for hearing.

Said charter further provides for empaneling a jury of six disinterested freeholders of Kansas City, for assessing the damages, and further provides that the jury shall assess the damages for each piece of private property taken for public use, and also shall assess against the city and public generally, inclusive of benefit to any property of the city, and the balance of such compensation they shall assess the several lots and parcels of private property
117 within the benefit district, exclusive of the improvements thereon, deemed benefited by the proposed improvement as determined in the preceding section. Each lot or parcel of ground to be assessed with an amount bearing the same ratio to such balance as the benefit to each parcel or lot bears to the whole benefit to all the private property assessed. Said charter then provides that the clerk of the Municipal Court shall, after the rendition * * * of the verdict of the jury, report the same to the Common Council, which shall be confirmed within sixty days thereafter, and the city shall make an appropriation for the sum assessed against the city, and that the several amounts assessed by the jury against private

property shall be a lien on the several lots or parcels of private property charges from the date of the enactment of the ordinance providing for the improvement, until paid, and if not paid within sixty days after the confirmation of the verdict, shall bear interest at the rate of seven per cent per annum from the confirmation thereof, except as herein provided, and shall be collected by the city as by ordinance provided, by suit or otherwise as any other special taxes, or by special execution, as follows: a special tax bill against any lot or parcel of property assessed may be issued by the Clerk of the Municipal Court under his hand and his signature thereto shall be attested by the City Clerk under seal of the city, which tax bill shall contain a description of said lot or parcel of property and the amount assessed against the same, as fixed in the verdict, and state that the assessment has been made to pay compensation for private property taken or damaged, or both, as the case may be, for the purpose specified in the ordinance providing for the improvement, and that such assessment shall bear interest as herein provided. Each tax bill so issued, shall be filed in the office of the Clerk of the Circuit Court of Jackson County, Missouri, at Kansas City, and by such clerk recorded and indexed as a judgment in favor of the city against the property described in the tax bill. At any time after the filing and recording of any such tax bill, as aforesaid, a special execution may be issued thereon out of the Circuit Court, in vacation or term time, as on a judgment of the court in favor of the city, which execution shall recite the tax bill or the record thereof, and state when the tax bill was filed, and be directed to the Sheriff of Jackson County, and command him, in case the assessment, interest and costs be not paid to him, to sell the property therein described, or so much thereof as may be necessary to pay such assessment, interest and costs.

And plaintiff further shows to this Honorable Court that the City of Kansas City deemed it advisable to open and widen Sixth Street, from the east line of Bluff Street to the west line of Broadway, and that, in pursuance thereof, the said city did pass an Ordinance No. 1750, entitled "An Ordinance to open and widen Sixth Street from the east line of Bluff Street to the west line of
118 Broadway," approved July 14, 1909; and that thereafter, to-wit: on the 16th day of October, 1909, the Common Council of said city passes an ordinance, which was approved by the Mayor on the 19th day of October, 1909, in words and figures as follows, to-wit:

"No. 3209.

An Ordinance

To open and widen Sixth (6th) Street, from the east line of Bluff Street to the west line of Broadway, and repealing Ordinance No. 1750, entitled "An Ordinance to open and widen Sixth Street from the east line of Bluff Street to the west line of Broadway," approved July 14, 1909.

Be it ordained by the Common Council of Kansas City:

Section 1. That said Sixth Street from the east line of Bluff Street to the west line of Broadway, be opened and widened, the boundary lines of which are more particularly described as follows, to-wit:

Beginning at a point on the west line of Broadway, One hundred (100) feet south of the north-west corner of Sixth Street and Broadway; thence west one hundred (100) feet south of and parallel to the north line of Sixth Street to the west line of Bluff Street; thence northeastwardly along the east line of Bluff Street to the south east corner of Sixth and Bluff Street; thence east along the south line of Sixth Street to the west line of Broadway; thence south to the beginning.

And all private property within said limits is hereby taken and condemned for public use as a part of Sixth Street and just compensation therefor shall be assessed, collected and paid according to law. The amount allowed for private property taken, shall be wholly raised by special assessments made against the property described in the next succeeding section, in accordance with Article VI of the charter of Kansas City, Missouri.

Section 2. The Common Council determines and prescribes the limits within which private property shall be deemed benefited by the improvement herein proposed, and be assessed and charged to pay compensation therefor, as follows, to-wit:

Beginning at the intersection of the center line of the main channel of the Missouri River with the State line between Missouri and Kansas, produced from the south; thence south along said state line and said State line produced, to the southwest corner of the north west quarter (¼) of the northwest quarter (¼) of section seven (7), township forty nine (49) range thirty three (33); thence east along the line of said quarter, and said line produced, to the east line of Allen Avenue; thence to the south west corner of lot two hundred and sixty seven (267), block five (5), re-survey of Whipple's Second Addition; thence to the south
119 east corner of lot One Hundred and eighty six (186), in said block; thence to the north west corner of lot Two hundred and thirty nine (239), block two (2) in said addition; thence to the north east corner of said lot; thence to the north west corner of lot fifty four (54) in said block; thence to the north east corner of said lot fifty four (54); thence to a point on the west line of Mercier Place where it is intersected by the center line of Twentieth Street, produced from the east; thence east along the center line of Twentieth (20th) Street to the center line of Forest Avenue north of Twentieth (20th) street; thence north along the center line of Forest Avenue to the center of Independence Avenue; thence east along the center line of Independence Avenue to the center line of Forest Avenue north of Independence Avenue; thence north and northwardly along the center line of Forest Avenue and said line produced to the center line of the main channel of the Missouri River; thence along the center line of the Missouri River to the beginning.

Section 3. Ordinance No. 1750, entitled "An Ordinance to open

and widen Sixth Street from the east line of Bluff Street to the west line of Broadway," approved July 14, 1909, is hereby repealed, and all ordinances or parts of ordinances in conflict with this ordinance are, in so far as they conflict, repealed.

Passed Oct. 16, 1909. Frank J. Shinnick, Speaker Lower House of the Common Council. Attest M. A. Flynn, City Clerk. Passed Oct. 18, 1909. R. L. Gregory, President Upper House of the Common Council. Approved Oct. 19, 1909 Thomas T. Crittenden, Jr., Mayor. (Seal).

That prior to the passage and approval of said Ordinance but not thereafter as required by said Charter, the City Engineer made out and delivered to the Clerk of the Municipal Court of said City, a statement by map and plat designated by Section 2 of Article VI of the Charter of Kansas City, which was filed with the clerk of the Municipal Court on the 3rd day of August, 1909; that a part of the land sought to be taken in said proceedings for the opening and widening of Sixth Street, was a portion of what is known as Kersey Coates Terrace Park, a public park, owned and controlled by Kansas City, Missouri, and that the Board of Park Commissioners of Kansas City, Missouri, passed a resolution, No. 8930, which is as follows:

Resolution No. 8930.

Whereas application has been made to the Common Council of Kansas City, Missouri, for the widening of Sixth Street in said city to the width of one hundred (100) feet, between Broadway and Bluff Streets of said city, said widening being made by the addition to the south side of said street as now established of a strip
120 of land forty (40) feet wide, extending from the west line of Broadway to the east line of Bluff Street in said city, and

Whereas, in carrying out the widening and construction of said streets as aforesaid, it will be necessary to construct the same th-ough, upon and over a portion of Kersey Coates Terrace Park, to-wit: through, upon and over the north end of said Kersey Coates Terrace Park, and

Whereas, by Section 37 of Article XIII of the charter of Kansas City, it is provided that: "No roads nor streets shall be laid out or constructed through any park, except said Board of Park Commissioners shall lay out or construct, or permit the laying out and construction of the same," and

Whereas, this Board deems it advisable and necessary to permit the widening of said Sixth street as aforesaid,

Therefore Be It Resolved By The Board Of Park Commissioners:

Section 1. That permission be, and the same is hereby given to the widening of said Sixth Street by ordinance, so as to include within said street a strip of ground over and in the north end of said Kersey Coates Terrace Park aforesaid, described as follows: Beginning at the point of intersection of the south line of Sixth Street with the east line of Bluff Street; thence east One Hundred

and seventy seven and seventy five hundredths (177.75) feet to a point in the south line of Sixth street; thence south forty (40) feet; thence west parallel with the south line of Sixth street to the east line of Bluff street; thence northeastwardly along the east line of Bluff street to the point of beginning.

Section 2. That a certified copy of this resolution be delivered to the Common Council of Kansas City as notice to said Common Council of the recommendation and action of this Board."

That thereafter, on the first day of November, 1909, the following order was made by the Municipal Court of Kansas City, to-wit:

In the Municipal Court of Kansas City.

Condemnation.

Notice to Property Holders.

In the Matter of the Proceedings to Open and Widen Sixth Street from the East Line of Bluff Street to the West Line of Broadway, and Repealing Ordinance No. 1750, Entitled "An Ordinance to Open and Widen Sixth Street from the East Line of Bluff Street to the West Line of Broadway," ap-roved July 14, 1909.

Now on this first day of November, 1909, comes Clarence A. Burney, Assistant City Counsellor, and shows to the Court that on the 3rd day of August, 1909, the City Engineer of Kansas City, made out and delivered to the Clerk of the Municipal — a
121 statement by plat, map, or otherwise, containing a correct description of the several lots or parcels of private property to be taken or damaged, with the representative names of the owners and parties interested therein, so far as known, who were such at the time the Ordinance hereinafter mentioned took effect, and the court makes the following order herein, to-wit:

To All Persons Whom It May Concern, Greeting: Whereas, there was passed in the Common Council of Kansas City, Missouri, Ordinance No. 3209, entitled "An Ordinance to open and widen Sixth street from the east line of Bluff Street to the west line of Broadway, and repealing ordinance No. 1750, entitled, "An Ordinance to open and widen sixth street from the east line of Bluff street to the west line of Broadway," approved July 14, 1909, which Ordinance was approved and took effect on the 19th day of October, 1909, a description of the property to be taken or damaged, as contained in said Ordinance being as follows, to-wit:

Beginning at a point on the west line of Broadway, one hundred (100) feet south of the northwest corner of sixth street and Broadway; thence west one hundred (100) feet south of and parallel to the north line of Sixth Street to the east line of Bluff Street; thence northeastwardly along the east line of Bluff Street to the southeast corner of Sixth street and Bluff street; thence east along the south line of sixth street to the west line of Broadway; thence south to beginning.

The property contained in the benefit district as described in said Ordinance (which property will be assessed to pay for the private property taken) being as follows: Beginning at the intersection of the center line of the main channel of the Missouri River with the state line between Missouri and Kansas, produced from the south; thence south along said state line and said state line produced, to the south west corner of the north west quarter (¼), of the north west quarter (¼) of section seven (7), township forty-nine (49), range thirty-three (33), thence east along the line of said quarter (¼) quarter (¼), and said line produced, to the east line of Allen Avenue; thence to the southwest corner of lot two hundred and sixty-seven (267) block five (5), Resurvey of Whipple's Second Addition; thence to the Southeast corner of lot one hundred and eighty-six (186) in said block; thence to the northwest corner of lot two hundred and thirty-nine (239), block two (2), in said addition; thence to the northeast coner of said lot; thence to the northwest corner of lot fifty-four (54) in said block; thence to the northeast corner of said lot fifty-four (54); thence to a point on the west line of Mercier Place, where it is intersected by the center line of Twentieth (20th) street produced from the east; thence along the center line of Twentieth street (20th) to the center line of Forest Avenue north of Twentieth (20th) street; thence north along the center line of Forest Avenue to the center of Independence Avenue;
122 thence east along the center line of Independence Avenue, to the center line of Forest Avenue north of Independence Avenue; thence north and northwardly, along the center line of Forest Avenue and said line produced to the center line of the main channel of the Missouri River; thence along the center line of the main channel of the Missouri River to the beginning.

Now, therefore, you and each of you are hereby notified that the sixth day of December, 1909, at two o'clock P. M. is the day, and the Lower House Council Chamber on the fourth floor of the City Hall Building, on the southeast corner of Fourth and Main Streets, in Kansas City, Jackson County, Missouri, is the place fixed for impaneling a jury to ascertain the compensation for the property to be taken, or damaged, and to make assessments to pay for the same.

And the court further orders that a copy of this order shall be published in the Daily Record, the newspaper at this time doing the city printing, for four (4) consecutive weeks, the last insertion to be not more than one week prior to the day set for said hearing; and that a copy of this order be served, as by the Charter of Kansas City provided, upon each and every resident of Kansas City, owning or having an interest in the real estate proposed to be taken or damaged.

A true copy of the original order.

JOHN McCORD,
Clerk Municipal Court of Kansas City.
HARRY G. KYLE,
Judge Municipal Court of Kansas City.

On the foregoing order issued by the court, dated November 1, 1909, the following returns were made by N. D. Olson, Police officer of Kansas City, as follows, to-wit:

"I hereby certify that I executed and served the within order and notice in Kansas City, Missouri, by delivering a copy thereof personally to each of the following owners and parties in interest, within named. On the 5th day of October, 1909, to John C. Nerewith, Trustee Travelfers Insurance Company of Hartford, James B. Welch, Trustee Kansas City Trust Company, Mara J. Tuller, Bert H. Fuller, Daniel B. Holmes, B. T. Whipple, trustee. J. T. W. Hairston, William P. M. Stevens, Aeleen James. Ellen S. Stevens. Charles R. Meyer. Sidney Smith, trustee. Carlin Lee. Della B. Frazier.

On the 6th day of October, 1909, Joseph C. Ford. Jemuel C. Gates. Frank Norton.

I hereby certify that I executed and served the within order and notice in Kansas City, Missouri, upon the following owners and persons in interest, by leaving a copy thereof for such owners and parties in interest at their usual place of abode with some member of their respective family over the age of 15 years.

123

On the 6th day of October, 1909, John Houlihan. William Volker.

I hereby certify that I executed and served the within order and notice in Kansas City, Missouri, on Travellers Insurance Company of Hartford by leaving a copy thereof at a business office of said company, with John C. Meredith, loan agent and person in charge of said business office. The President or chief officer being absent from Kansas City and Jackson County, this 5th day of October, 1909.

I hereby certify that I executed and served the within order and notice in Kansas City, Missouri, on Kansas City, Missouri, by leaving a copy thereof at the business office of said company with T. T. Crittenden, Mayor, a person in charge of said business office, the President or other chief officer being absent from Kansas City and Jackson County, this 6th day of October, 1909.

I hereby certify that I have diligently searched, and that service cannot be made of the within order and notice upon the following corporations respectively within named, either by delivering a copy thereof, to the President or other chief officer, of such corporation, with the person having charge thereof within the limits of Kansas City, Jackson County, Missouri. The Western Investment Company, Christian Brothers College, of St. Louis.

I further certify that service cannot be made of the within notice in Kansas City, Missouri, upon the following property owners and parties within named; either by delivering a copy of such notice personally to such property owners and parties, or by leaving a copy at the usual place of abode of such property owners and parties, with a member of their respective families over the age of fifteen years: Samuel C. Lee. Henry Gibhart. Edward A. Kelly and Otis Norcross, trustee under the will of Eunice M. Weeks. Otis Norcross,

Eunice Weeks. Ada Forbush. Joshena Forbush. Maria Forbush. Fidelia O. Case. Flora Tuller Pinck. Lucilla Tuller Wagner. Oliver P. W. Bryant. John Bryant. George S. Bryant. William L. Bryant. Bessie Galloway. Justus H. Schwenson. J. T. W. Hairston. Agnes M. Hairston. Alice H. Moore. George G. Pierce. Carlin Lee. John M. Gunn.

Witness my hand this 6th day of October, 1909.

N. B. OLSEN,
Police Officer, Kansas City, Missouri.

That said order of November 1st, 1909, was published in the Daily Record beginning on the first day of November, 1909, and published daily exclusive of Sundays, up to and including the 27th day of November, 1909, as shown by the following publication and affidavit of publication, which are as follows, to-wit:

124 No. 3209.

In the Municipal Court of Kansas City.

Condemnation.

Notice to Property Owners.

In the Matter of the Proceedings to Open and Widen Sixth Street from the East Line of Bluff Street to the West Line of Broadway, and Repealing Ordinance No. 1750, entitled "An Ordinance to Open and Widen Sixth Street from the East Line of Bluff Street to the West Line of Broadway," approved July 14, 1909.

Now, on this first day of November, 1909, comes Clarence A. Burney, Assistant City Counselor, and shows to the court that on the 3rd day of August, 1909, the City Engineer of Kansas City made out and delivered to the Clerk of the Municipal Court a statement by plat, map or otherwise, containing a correct description of the several lots or parcels of private property to be taken or damaged, with the respective names of the owners and parties interested therein, so far as known, who were such at the time the Ordinance hereinafter mentioned took effect, and the court makes the following order herein, to-wit:

To All Persons Whom It May Concern Greeting:

Whereas there was passed by the Common Council of Kansas City, Missouri, Ordinance No. 3209, entitled, "An Ordinance to open and widen Sixth Street from the east line of Bluff Street to the west line of Broadway; and repealing ordinance No. 1750, entitled: "An Ordinance to open and widen Sixth street from the east line of Bluff street to the west line of Broadway," approved July 14, 1909, which Ordinance was approved and took effect on the 19 day of October, 1909, a description of the proposed property to be taken or damaged, as contained in said ordinance being as follows, to-wit:

Beginning at a point on the west line of Broadway one hundred (100) feet south of the northwest corner of Sixth street and Broadway; thence west one hundred (100) feet south of and parallel to the north line of Sixth street, to the east line of Bluff street; thence north eastwardly along the east line of Bluff street to the southeast corner of Sixth street and Bluff street; thence east along the south line of Sixth street to the west line of Broadway; thence south to beginning.

The property contained in the benefit district in said ordinance (which property will be assessed to pay for the private property taken) being as follows, to-wit:

Beginning at the intersection of the center line of the main channel of the Missouri River with the state line between Missouri and Kansas, produced from the south, thence south along said state line and said state line produced to the southwest corner of the northwest quarter (¼) of the northwest quarter (¼) of sec-
125 tion seven (7), township forty-nine (49), range thirty-three (33); thence east along the line of said quarter one-fourth and said line produced, to the east line of Allen Avenue; thence to the southwest corner of lot two hundred and sixty seven (267), block five (5), Re-survey of Whipple's Second Addition, thence to the southeast corner of lot one hundred and eighty-six (186) in said block, thence to the northwest corner of lot two hundred and thirty-nine (239) block two (2) in said addition; thence to the northeast corner of said lot; thence to the northwest corner of lot fifty-four (54) in said block; thence to the northeast corner of said lot fifty-four (54); thence to a point on the west line of Mercier Place where it is intersected by the center line of Twentieth (20th) street, produced from the east; thence east along the center line of Twentieth (20th) street to the center line of Forest Avenue north of Twentieth (20th) street, thence north along center line of Forest Avenue to the center line of Independence avenue, thence east along the center line of Independence avenue to the center line of Forest Avenue north of Independence avenue; thence northwardly along the center line of Forest Avenue and said line produced to the center line of the main channel of the Missouri River; thence along the center line of the main channel of the Missouri River to the beginning.

Now, therefore you, and each of you are hereby notified that the 6th day of December, 1909, at two o'clock P. M. is the day, and the Lower House Council chamber on the fourth floor of the City Hall Building on the southeast corner of Fourth and Main Streets in Kansas City, Jackson County, Missouri, is the place fixed for empaneling a jury to ascertain the compensation for the property to be taken or damaged and to make assessments to pay for the same.

And the court further orders that a copy of this order shall be published in the Daily Record, the newspaper at this time doing the city printing, for four consecutive weeks, the last insertion to be not more than one week prior to the day set for said hearing; and that a copy of this order be served, by the charter of

Kansas City provided, upon each and every resident of Kansas City owning or having an interest in the real estate proposed to be taken or damaged.

A true copy of the original order.

JOHN McCORD,
Clerk Municipal Court of Kansas City.
HARRY G. KYLE,
Judge Municipal Court of Kansas City.

Affidavit of Publication.

STATE OF MISSOURI.
County of Jackson, ss:

Ernest E. Smith, of lawful age being duly sworn says that he is one of the publishers of the Daily Record, a newspaper published daily except Sundays, in Kansas City, Jackson County, Missouri, and that the notice of condemnation No. 3209, a true
126 copy of which is hereto attached, was duly published in the daily edition of said newspaper for twenty four days, beginning November 1st, 1909, and ending November 22nd, 1909, on the following dates: November 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, being volume 44 and numbers 105, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, of said paper.

[SEAL.] ERNEST A. SMITH,
Notary Public in and for Jackson County.

That on the sixth day of December, 1909, said cause coming on to be heard, the City by its attorneys submitted to the court the foregoing proofs of publication and personal service by said police officer of Kansas City, and thereupon the court decided that no further notice was necessary, and said proceedings were continued until the 13th day of December, 1909, a jury was empaneled, composed of six freeholders of Kansas City, and sworn to faithfully and honestly discharge their duties according to law, and were instructed to view the property to be taken, damaged and assessed with benefits, before making their report, and the cause was continued until the 20th day of December, 1909.

That on the 20th day of December, 1909, the Municipal Court of Kansas City made the following entry in said proceeding, to-wit: "Now, on this twentieth day of December, 1909, it being the day to which this case was continued for further proceedings, comes Kansas City by Clarence A. Burney, Assistant City Counselor, comes also all persons and parties interested in these proceedings as well as the jury *hearing*, and the court for good cause shown does continue this case until the twenty-third day of December, 1909, at two P. M. for further proceedings."

And on the twenty-third day of December, 1909, the Municipal Court of Kansas City made another order in which it recites: "comes

also all the persons and parties interested in these proceedings as well as the jury herein, etc."

And on the fifth day of January, 1910, the Municipal Court of Kansas City made an order for continuance, in which it recites among other things, "comes also all persons and parties interested in these proceedings, as well as the jury herein, etc."

And on the seventh day of March, 1910, the Municipal Court of Kansas City made the further order in which it recites, "comes also all persons and parties interested in these proceedings and comes also John Johnson, Nathaniel Dickey, Henry Meyer, D. A. Norris, Sydney Smith and William F. Woods, and the jury empaneled herein, and the jury having viewed the property to be taken, damaged and assessed, and having heard the evidence and been instructed by the court, rendered their report and verdict, and are by the court discharged."

127 That in and by said verdict the said jury assessed against the above described property of the Union Pacific Railroad Company, the sum of Two Thousand four hundred and seventy eight dollars and twenty six cents ($2,478.26), which verdict was duly confirmed on the said seventh day of March, 1910; and that the defendant, Kansas City herein, and the defendants U. L. Weary and M. A. Flynn are threatening to, and will unless restrained by the order of this court, issue tax bills against the above described property of your orator herein, and are now threatening to proceed, and will unless restrained by the order of this court, to issue tax bills against the above described property of your complainant, and issue tax bills and levy executions upon and sell said property to satisfy said assessments in the above proceedings; and plaintiff avers that said tax bills are a cloud upon complainant's title herein.

And plaintiff further avers that the said allegations, made by such Municipal Court, in the above and foregoing entries, to-wit: "comes also all persons and parties interested in these proceedings" are false in this, that this plaintiff had no knowledge of said proceedings, and made no appearance therein by any agent or attorney in said case, and never knew of the pendency of this proceeding or proceedings, until long after said verdict had been assessed and confirmed, and until plaintiff was notified about said assessment by the City Treasurer of Kansas City, Missouri, which was in the month of May, 1910.

And the plaintiff further avers that said allegations in said record entries of said Municipal Court are false and fraudulent, insofar as it recites that this plaintiff appeared in such proceedings, and that the only notice of any kind or character given to the plaintiff herein, was the publication notice hereinbefore set forth.

And plaintiff further avers that no plat was filed by the City Engineer of Kansas City after the passage and approval of said ordinance number 1750 aforesaid; and that said Ordinance does not provide for assessing any benefits against Kansas — as required by said charter; that a part of said property sought to be taken, and for which the aforesaid special benefits were, etc., already belonged to Kansas City, Jackson County, Missouri, and that Kansas City

was not and is not entitled to assess any benefits against complainant's property herein.

Plaintiff further avers that part of the property set forth and described in the benefit district, is embraced in the bed of the Missouri River, and is not susceptible of being assessed for any benefits, which the said city and other said defendants well knew, or ought to have known, and

Plaintiff further avers that the said publication notice above set forth, was not published in a weekly newspaper, for four consecutive weeks as required by said Charter, but that the same was published in a daily newspaper, called the "Daily Record," which is a newspaper not of general circulation in Kansas City, Jack-
128 son County, Missouri, but is a newspaper of limited circulation, among real estate men, attorneys and court officials, and plaintiff avers that said publication was published only for twenty-four (24) days, *beginning* on the twenty-seventh (27th) day of November, 1909; that the same was not published for four consecutive weeks as required by the Charter of Kansas City, Missouri, aforesaid, and that the last insertion of said publication was made more than one week prior to the sixth (6th) day of December, 1908, the day set for the hearing of said proceeding, and plaintiff further shows that no other notice of any kind or character was given to the plaintiff herein of the pendency of said proceeding, and no appearance of any kind or character was made by the plaintiff or any of its agents in such proceedings; and that the allegation that all the parties interested appeared in said Municipal Court is false, so far as the plaintiff is concerned; and that plaintiff had no knowledge of such proceeding prior to such date; so that the plaintiff herein had no right of appeal under and by virtue of any charter provisions of said charter of Kansas City, Missouri, and

The Plaintiff avers that it has no adequate remedy at law for the prevention of the wrongs herein complained of.

Plaintiff further shows, on information and belief, that the jurors aforesaid, were not all disinterested freeholders of Kansas City, Missouri, as required by the said Charter.

Plaintiff further avers on information and belief, that the said property is not being taken for public use as alleged in said ordinance, but that the same is being taken wholly for private purposes and for the use of private corporations and individuals, and not for the use of the public.

Plaintiff further shows on information and belief, that after the confirmation of said verdict, certain property owners in said district who were advised of such proceedings took an appeal from said judgment awarding them damages for taking their property in said district aforesaid, but that before said appeal was filed in the Circuit Court of Jackson County, Missouri, certain persons, interested in having said proceedings carried out, wrongfully purchased from said parties taking the appeals, all their right, title and interest in and to said property and appeal, and procured such persons to dismiss their appeal in the Circuit Court of Jackson County, Missouri, all without the knowledge, asquiescence or consent of this plaintiff.

Plaintiff further avers that the said assessment of damages as aforesaid for the opening and widening of Sixth Street, is and was so exorbitant and excessive as to indicate passion and prejudice in the minds of the jury making such assessments, and shows that such jurors were not freeholders, and fair and impartial citizens, as required by the Charter of Kansas City, Missouri.

And this plaintiff further avers that while the said judgment, on its face, shows a personal appearance of all the parties in-
129 terested in said proceedings, such allegations in the order of the Municipal Court of Kansas City, Missouri, are false and fraudulent, insofar as this plaintiff is concerned; and that this plaintiff never appeared in such proceedings at any time, or authorized anyone in its behalf to appear in such proceedings; and that the said judgment in truth and in fact by virtue of the publication notice and the pleadings thereon is and was null and void, although it does not so appear upon the face of said judgment. Plaintiff brings this suit on behalf of itself and all other persons similarly situated who join in this proceeding and pay their share of the expense of this suit.

Wherefore, the premises considered, plaintiff prays this Honorable Court to issue a restraining order against defendants, M. A. Flynn and U. L. Weary and Kansas City herein, perpetually restraining and enjoining each of said defendants from executing said judgment; and that the said U. L. Weary be enjoined and restrained from making any tax bills against the property of the complainant hereinbefore described, by virtue of said proceeding; and that the said defendant, M. A. Flynn be perpetually enjoined and restrained from attesting any such tax bills issued in the said proceeding, against the property of the complainant herein; and that the defendant, Oscar Hochland, Clerk of the Circuit Court of Jackson County, Missouri, be perpetually enjoined and restrained from recording any of such tax bills, or indexing the same as a judgment in favor of Kansas City against the above described property of plaintiff, and from issuing a special execution thereon out of said Circuit Court; and that this court adjudge and decree in the Municipal Court of Kansas City, Missouri in said proceeding; and that this court adjudge and decree such proceedings above set forth in which the said City of Kansas City attempted to open and widen Sixth Street, and to assess benefits against the above described property of complainant herein to be in violation of the Charter of Kansas City, Missouri and to be null and void for the plaintiff to comply with the terms thereof, in such cases made and provided; and that such publication so made as aforesaid, be decreed not to be the due process of law required by the Fourteenth (14th) amendment to the Constitution of the United States; and that the said proceedings be declared to be no lien upon the property of the plaintiff hereinbefore described; and that said plaintiff's property be declared to be exempt from any charge or assessment sought to be imposed or levied upon its said described property under such proceedings; and that the plaintiff have such other and further relief as the nature of the case requires and to Your Honor seems meet; and that a Writ of Summons be issued out of

this Honorable Court directed to the said defendants and each of them, commanding them, under certain penalties therein to be specified, to be and appear before this Honorable Court, and then and there to answer—but not under oath—all and singular the
130 premises, and to stand to, perform and abide such order and decrees therein, as to the Court does seem meet.

R. W. BLAIR &
DOUGLASS & WATSON,
Attorneys for Plaintiff.

STATE OF MISSOURI,
County of Jackson, ss:

I. N. Watson, being duly sworn on his oath, states, that he has read the foregoing bill of complaint; that the facts therein stated are true to his best knowledge and belief as to those facts which he states upon information and belief, and such facts he believes to be true; and he further states that he is the duly authorized agent of the Union Pacific Railroad Company to make this complaint, and makes the same for, and in behalf of the Union Pacific Railroad Company.

(Signed) I. N. WATSON.

Subscribed and sworn to before me this 1st day of August, 1910.

[Seal John M. Orr, Notary Public.]

JOHN M. ORR,
Notary Public, Jackson County, Missouri.

Mr. Ball: I offer in evidence the Entry of Appearance and Intervening Petition of the Federal Investment Company, in cause No. 52,754—in which the original petition was just introduced.

Mr. Lee: We object to it for the same reasons.

The Court: Objection overruled.

Said Entry of Appearance and Intervening Petition of the Federal Investment Company, so offered in evidence, was marked Exhibit "G," and is in the words and figures following, to-wit:

EXHIBIT "G."

"In the Circuit Court of Jackson County, at Kansas City, Missouri, October Term, 1910.

No. 52754.

UNION PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
M. A. FLYNN et al., Defendants.

Now comes Federal Investment Company, a corporation, and enters its appearance as co-plaintiff in the above entitled cause and alleges and charges the facts therein as same are set forth in the

petition of plaintiff Union Pacific Railway Company, and this plaintiff adopts and affirms all the allegations made and set forth in said petition.

This plaintiff further states that as shown by the verdict and judgment mentioned in the original petition its property as
131 therein described has been assessed wrongfully as set forth in said verdict and judgment; that this plaintiff is in all respects similarly situated with the original plaintiff herein; that all the allegations in said original petition apply and are true as to this plaintiff and its property as are charged and alleged as to the original plaintiff and its property in respect to the verdict and judgment therein mentioned; that said verdict and judgment are wholly without jurisdiction and void; and that the same constitutes an apparent lien and cloud on the property of this plaintiff.

Wherefore, this plaintiff prays the court to set aside and annul said judgment and to cancel the same so far as it purports to affect this plaintiff's property, and to enjoin and restrain the officers of defendant Kansas City and of this court from taking any action to enforce said judgment against this plaintiff's property and that said judgment be annulled and set aside and held wholly void, and for such other and further and different orders as this plaintiff may be found entitled to in the premises.

(Signed) BALL & RYLAND,
Attorneys for Plaintiff Federal Investment Company.

Mr. Ball: I also offer in evidence the Entry of Appearance and Intervening Petition of the Edgewater Terminal Railway Company, in the same case.

Mr. Petherbridge: The city offers the same objection to that, as to the original petition.

The Court: Objection overruled.

Said Entry of Appearance and Intervening Petition of the Edgewater Terminal Railway Company, so offered in evidence, was marked Exhibit "H," and is in the words and figures following, to-wit:

EXHIBIT "H."

"In the Circuit Court of Jackson County, at Kansas City, Missouri, January Term, 1911, Division 3.

No. 52754.

UNION PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
M. A. FLYNN et al., Defendants.

Now comes Edgewater Terminal Railway Company and enters appearance in the above entitled cause and prays to be made a party plaintiff therein, and states to the court that this plaintiff is and

was at the time of the institution of the proceedings mentioned in the original petition herein the owner of the following described property within the benefit district described in said petition and in the proceedings therein mentioned; tracts assessed by bills numbered 2, 3, 4 and 5 at page 13 of the verdict and judgment record
132 of the Municipal Court of Kansas City, Missouri.

This plaintiff joins in the petition of the original plaintiff, Union Pacific Railway Company, and alleges and charges the facts herein to be as are set forth in said petition and adopts and affirms all and singular the allegations therein contained. This plaintiff is in all respects similarly situated with the original plaintiff herein and the allegations in said original petition apply and are true as to plaintiff and plaintiff's said property as are charged and alleged as to the original plaintiff and its property; that the Municipal Court had and acquired no jurisdiction of this plaintiff or of said property; that no notice or process was ever served on plaintiff in said proceedings in the Municipal Court, nor did plaintiff enter appearance therein or have any knowledge of said proceedings until long after the same had been concluded and after the time fixed by the Charter of Kansas City within which to appeal from said judgment had expired; that said verdict and judgment were found and rendered in said Municipal Court wholly without any jurisdiction of this plaintiff or of said property, and said verdict and judgment constitute, or if certified to the Clerk of the Circuit Court of Jackson County, Missouri, will constitute an apparent lien and cloud on said property.

Wherefore this plaintiff prays the court to set aside, annul and adjudge void said judgment and the assessment therein made against plaintiff's said property so far as the same purports to affect said property and to enjoin and restrain the officers of defendant Kansas City, of this court and defendants herein from taking any action to enforce said judgment against plaintiff's said property, and for such other and further relief as this plaintiff may be entitled to in the premises, and for costs.

(Signed) BALL & RYLAND,
Attorneys for Plaintiff.

(Signed) EDGEWATER TERMINAL RAILWAY CO."

Mr. Morse: I want to offer in evidence the Entry of Appearance and Intervening Petition of the Kansas City Stock Yards Company of Missouri.

Mr. Petherbridge: We make the same objections to the Intervening Petition of the Kansas City Stock Yards Company of Missouri, and for the same reasons as offered to the original petition in the same cause.

The Court: Overruled.

Said Entry of Appearance and Intervening Petition of the Kansas City Stock Yards Company of Missouri, so offered in evidence, was marked Exhibit "J," and is in the words and figures following, to-wit:

133 EXHIBIT "J."

"In the Circuit Court of Jackson County, Missouri, at Kansas City, April Term, 1910.

No. 52754.

UNION PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
M. A. FLYNN, City Clerk, Kansas City, Missouri; U. L. WEARY, Clerk of the Municipal Court of Kansas City, Missouri; Oscar Hochland, Clerk of the Circuit Court of Jackson County, Missouri, and Kansas City, a Municipal Corporation, Defendants.

Intervening Petition of the Kansas City Stock Yards Company of Missouri.

Now comes the Kansas City Stock Yards Company of Missouri and shows to the court that it is a citizen and resident of the State of Missouri; that it is owner of real estate in the benefit district described in Ordinance No. 3209, of Kansas City, Missouri, entitled an Ordinance to Open and Widen Sixth Street which ordinance is the subject of the controversy herein; that its rights and interest in this suit are identical with those of the plaintiff, and that it is entitled to the same relief.

Wherefore, this petitioner prays that it be allowed to intervene herein; that it be made a party plaintiff and that it be allowed to share in the relief, if any, which may be granted to the plaintiff.

(Signed) DANA, COWHERD & INGRAHAM.
(Signed) ARTHUR H. MORSE.
Attorneys for Petitioner.

STATE OF MISSOURI,
County of Jackson, ss:

Arthur H. Morse of lawful age being first duly sworn on oath states that he is attorney for the above named petitioner and makes this affidavit for and in its behalf; he had read the foregoing petition and the same is true as he verily believes.

(Signed) ARTHUR H. MORSE.

Subscribed and sworn to before me this — September, 1910.
(Signed) MYRTLE M. CHRISTINE,
[SEAL.] *Notary Public.*

My commission expires June 7th, 1914."

Mr. Watson: I also want to offer in evidence the whole Judgment Entry in said cause, No. 52,754—being record entry found in Record No. 306, beginning at page 536 and continuing on Page 537, in the Records of the Clerk of the Circuit Court of Jackson County, Missouri, at Kansas City.

Mr. Langworthy: Why can't we offer that on behalf of all of the defendants—in order to save any question about it?

134 The Court: All evidence introduced, so far as it relates to or affects any of the issues in the case, will be considered as introduced by each individual defendant.

Mr. Petherbridge: The City objects to the offer of the Judgment Entry, in Book 306, at Page 536 and 537, in the Circuit Court Records of Jackson County, at Kansas City, Missouri, for the reason that it is incompetent, irrelevant and immaterial, and does not prove or tend to prove or disprove any of the issues made in this hearing; and, for the further reason that it does not prove or tend to prove that the matters set up are res judicata; and, for the further reason that the matters set up in the answer of defendants making this offer are not properly pleaded as res adjudicata; and, because the matter therein is not res adjudicata—the matter therein contended for not being between the same parties, or involving the same cause of action or the same matter.

The Court: Overruled.

Said Judgment Entry in Book 306, at Page 536 and 537 of the Records of the Circuit Court of Jackson County, Missouri, at Kansas City, so offered in evidence, is in the words and figures following, to-wit:

EXHIBIT "K-1".

(Record 306—Pages 536 & 537.)

"536.

20th Day January Term, 1911, Tuesday, January 31st, 1911.

52754.

UNION PACIFIC RAILWAY COMPANY et al., Plaintiffs,
vs.
M. A. FLYNN et al., Defendants.

Now, on this 31st day of January, 1911, come plaintiffs, Union Pacific Railway Company, Geo. S. Graham, H. G. Kaill, and James F. Mister, and Felix La Force, Federal Investment Company, Edgewater Terminal Railway Company, New York Life Insurance Company, James H. Sternber, and the Leach Estate Company, by their respective counsel, and come also the defendants by their counsel, and this cause coming on regularly to be heard and the court having heard the evidence and heard and considered the arguments and briefs of counsel, and being fully advised in the premises, finds the issues in favor of the plaintiffs and that plaintiff Union Pacific Railway Company is and was at the time of the proceedings in the Municipal Court, mentioned in the petition, the owner of several tracts of land in said petition described; that at said time the

plaintiff Federal Investment Company, was and is the owner of the following tracts of land fully described in the verdict and judgment record of the said Municipal Court, to-wit: Tracts assessed by bills numbered 8, 10, and 11, at page 14 of said record, tract assessed by bill numbered 13, at page 15, thereof, tract assessed by bill
135 numbered 166 at page 27 thereof; tract assessed by bill numbered 1235 and 1236 at page 87 thereof, tract assessed by bill 2323 at page 151 thereof; that the plaintiff Edgewater Terminal Railway Company is and was at said times the owner of the following tracts described in said verdict and judgment record, to-wit; tracts assessed by bills numbered 2, 3, 4 and five at page 13 of said record; that plaintiff New York Life Insurance Company is and was at said times the owner of the following described properties assessed in said proceedings and judgment; beginning at the northeast corner of 9th Street and Baltimore Avenue, Kansas City, Missouri, thence east 120 feet, thence North 60 feet, thence east 110½ feet to the west line of Delaware Street, thence west along the north line of Delaware Street 122.09 feet, thence West to the East line of Baltimore Avenue, thence south 180 feet to beginning; also lots 11 to 16, both inclusive, in Aldine Place, an addition; also lot 3 in Block 1, T. S. Case's addition, all in Kansas City, Missouri; that Plaintiff James H. Sternberg, is and was at said times the owner of the following described land assessed in said judgment proceedings, to-wit: Lots 21, 22, 23 and 24, and the West 16½ feet of Lot 25, Cottage Place, an addition to, Kansas City, Missouri, being tracts assessed in bills numbers 2513 to 2517, both inclusive, in said proceedings and judgment; that Plaintiff the Leach Estate Company, is and was at said times the owner of the north 25 feet of lot 177, in Block 18, Old Town, an addition to Kansas City, Missouri, and lot 22 in Block 8, King's Resurvey of Hubbard's Addition to said city, and East 80-2/3 feet of Lot 13 and South half of Lot 14 in Block 2, Lucas Place, an addition to said city, all of which tracts are assessed in said proceedings, verdict and judgment.

And the court further finds that none of said plaintiffs were served with notice or process of any kind in said proceedings in the Municipal Court; that none of said plaintiffs had any knowledge thereof or opportunity to be heard therein; that none of said plaintiffs entered appearance therein; in person or by agent or attorney, and none of them had any knowledge of the finding of said proceedings till long after the verdict therein had been rendered and confirmed and judgment thereon entered and the time within which appeals might have been taken therefrom had expired, and that said plaintiffs did not learn of said proceedings or of said verdict, confirmation and judgment until notified to pay their several assessments by the City Treasurer of Kansas City, Missouri, during the latter part of May, 1910; that said verdict was confirmed on the 7th day of March, 1910.

The court further finds that said proceedings, verdict, confirmation thereof, and judgment is as to these plaintiffs and each of them and as to their respective properties inoperative and of no effect and that the several assessments undertaken to be made and levied upon

the plaintiffs' said several properties are void, and that said
136 Municipal Court in said proceedings had and acquired no jurisdiction therein of the plaintiffs or any of them or of their said properties.

It is, therefore, considered, ordered, adjudged and decreed by the court, that said assessments, in so far as they effect or purport to effect plaintiffs or any of them or any of their several properties, be and the same are hereby annulled and for naught held; that the several assessments against the respective properties aforesaid of the plaintiffs and each of them be and the same are hereby set aside and annulled; the Defendant Kansas City, M. A. Flynn, City Clerk, U. L. Weary, Clerk of said Municipal Court, and the officers and agents of said City, be and they are each of them perpetually restrained and enjoined from making out, certifying or attesting any tax bills against the several properties of the plaintiffs or any of them under and by virtue of said assessments, and that plaintiffs have and recover from the defendant, Kansas City, the costs herein expended and have execution therefor."

Mr. Watson: I want to offer the original Notice issued by the Municipal Court of Jackson County, Missouri, under Ordinance No. 3209, which was set forth in the Bill in Equity in cause No. 52754, and the Proof of Publication thereon.

Said original Notice of Publication and Proof of Publication, so offered in evidence, was marked Exhibit "K-2", and is in the words and figures following, to-wit:

EXHIBIT "K-2".

"No. 3209.

In the Municipal Court of Kansas City.

Condemnation.

Notice to Property Owners.

In the Matter of the Proceedings to Open and Widen Sixth Street from the East Line of Bluff Street to the West Line of Broadway, and Repealing Ordinance No. 1750, Entitled "An Ordinance to Open and Widen Sixth Street from the East Line of Bluff Street to the West Line of Broadway," Approved July 14, 1909.

Now, on this first day of November, 1909, comes Clarence A. Burney, Assistant City Counsellor, and shows to the court that on the 3rd day of August, 1909, the City Engineer of Kansas City made out and delivered to the Clerk of the Municipal Court a statement by plat, map or otherwise, containing a correct description of the several lots or parcels of private property to be taken or damaged, with the respective names of the owners and parties interested therein, so far as known, who were such at the time the Ordinance hereinafter mentioned took effect, and the Court makes the following order herein, to-wit:

137 To All Persons Whom It May Concern, Greeting:

Whereas: there was passed by the Common Council of Kansas City, Missouri, Ordinance No. 3209, entitled, "An Ordinance to open and widen sixth street from the east line of Bluff street to the west line of Broadway, and repealing ordinance No. 1750, entitled: "An Ordinance to open and widen sixth street from the east line of Bluff Street to the west line of Broadway," approved July 14, 1909, which Ordinance was approved and took effect on the 19 day of October, 1909, a description of the proposed property to be taken or damaged, as contained in said Ordinance being as follows, to-wit: Beginning at a point on the west line of Broadway one hundred (100) feet south of the north west corner of sixth street and Broadway; thence west one hundred (100) feet south of and parallel to the north line of sixth street, to the east line of Bluff street; thence north eastwardly along the east line of Bluff street to the south east corner of sixth street and Bluff street; thence east along the south line of sixth street to the west line of Broadway; thence south to beginning.

The property contained in the benefit district in said ordinance (which property will be assessed to pay for the private property taken) being as follows, to-wit: Beginning at the intersection of the center line of the main channel of the Missouri River with the state line between Missouri and Kansas, produced from the south, thence south along said state line and said state line produced to the south west corner of the north west quarter (¼) of the north west quarter (¼) of section seven (7), township forty nine (49) range thirty three (33); thence east along the line of said quarter (¼) and said line produced, to the east line of Allen avenue; thence to the south west corner of lot two hundred and sixty seven (267), block five (5), Re-survey of Whipple's Second Addition, thence to the south east corner of lot one hundred and eighty six (186) in said block, thence to the north west corner of lot two hundred and thirty nine (239) block two (2) in said addition; thence to the north east corner of said lot; thence to the north west corner of lot fifty four (54) in said block; thence to the north east corner of said lot fifty four (54), thence to a point on the west line of Mercier Place where it is intersected by the center line of Twentieth (20th) street, produced from the east, thence east along the center line of Twentieth (20th) street to the center line of Forest avenue north of Twentieth (20th) street, thence north along the center line of Forest avenue to the center of Independence avenue; thence east along the center line of Independence avenue to the center line of Forest avenue north of Independence avenue; thence northwardly along the center line of Forest avenue and said line produced to the center line of the main channel of the Missouri River; thence along the
138 center line of the main channel of the Missouri River to the beginning.

Now, therefore you, and each of you are hereby notified, that the 6th day of December, 1909 at two o'clock P. M., is the day, and the Lower House Council Chamber on the fourth floor of the City Hall Building on the south east corner of Fourth and Main Streets

in Kansas City, Jackson County, Missouri, is the place fixed for empanelling a jury to ascertain the compensation for the property to be taken or damaged and to make assessments to pay for the same.

And the court further orders that a copy of this order shall be published in the Daily Record, the newspaper at this time doing the City printing, for four consecutive weeks, the last insertion to be not more than one week prior to the day set for said hearing; and that a copy of this order be served, as by the charter of Kansas City provided, upon each and every resident of Kansas City owning or having an interest in the real estate proposed to be taken or damaged.

A true copy of the original order.

HARRY G. KYLE,
Judge Municipal Court of Kansas City.
JOHN McCORD,
Clerk Municipal Court of Kansas City.

Affidavit of Publication.

STATE OF MISSOURI,
County of Jackson, ss:

Ernest E. Smith, of lawful age, being duly sworn says, that he is one of the publishers of the Daily Record, a newspaper published daily, except Sundays, in Kansas City, Jackson County, Missouri, and that the notice of condemnation No. 3209, a true copy of which is hereto attached, was duly published in the daily edition of said newspaper for twenty-four days, beginning November 1st, 1909, and ending November 22nd, 1909, on the following dates: November 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, being volume 44 and numbers 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129 of said paper.

ERNEST E. SMITH.

Subscribed and sworn to before me this 27th day of November, 1909. And I certify that I am duly qualified as a Notary Public and that my term expires on the 25th day of February, 1913.

HAROLD A. SMITH,
[SEAL.] *Notary Public in for Jackson County."*

139 Mr. Watson: I also want to offer the Order of the Municipal Court of Kansas City, Missouri, made on the 1st day of November, 1909, under Ordinance No. 3209, being Notice by Publication to property holders, both as to persons having property taken and also persons having property assessed for benefits in that district.

Said Notice by Publication, so offered in evidence was marked Exhibit "L," and is in the words and figures following, to-wit:

EXHIBIT "L."

"In the Municipal Court of Kansas City.

Condemnation.

Notice to Property Holders.

In the Matter of the Proceedings to Open and Widen Sixth Street from the East Line of Bluff Street to the West Line of Broadway, and Repealing Ordinance No. 1750, Entitled "An Ordinance to Open and Widen Sixth Street from the East Line of Bluff Street to the West Line of Broadway." Approved July 14, 1909.

Now on this first day of November, 1909, comes Clarence A. Burney, Assistant City Counselor, and shows to the court that on the 3rd day of August, 1909, the City Engineer of Kansas City, made out and delivered to the Clerk of the Municipal Court a statement by plat, map or otherwise, containing a correct description of the several lots or parcels of private property to be taken or damaged, with the representative names of the owners and parties interested therein, so far as known, who were such at the time the Ordinance hereinafter mentioned took effect, and the court makes the following order herein to-wit:

To All Persons Whom it May Concern, Greeting:

Whereas, there was passed by the Common Council of Kansas City, Missouri, Ordinance No. 3209, entitled, "An Ordinance to open and widen Sixth street from the east line of Bluff street to the west line of Broadway, and repealing odinance No. 1750, entitled: "An Ordinance to open and widen Sixth street from the east line of Bluff street to the west line of Broadway," approved July 14, 1909, which Ordinance was approved and took effect on the 19th day of October, 1909, a description of the property to be taken or damaged as contained in said Ordinance, being as follows, to-wit:

Beginning at a point on the west line of Broadway, one hundred (100) feet south of the northwest corner of Sixth street and Broadway; thence west one hundred (100) feet south of and parrallel to the north line of sixth street to the east line of Bluff street; thence north eastwardly along the east line of Bluff street to the southeast corner of Sixth street and Bluff street; thence along the south line of Sixth street to the west line of Broadway; thence south to beginning.

140 The property contained in the Benefit District as described in said Ordinance (which property will be assessed to pay for the private property taken) being as follows: Beginning at the intersection of the center line of the main channel of the Missouri River with the state line between Missouri and Kansas, produced from the south; thence south along said state line and said state line produced, to the southwest corner of the northwest quarter

(¼) of the northwest quarter (¼) of section seven (7), township forty nine (49), range thirty three (33), thence east along the line of said quarter (¼) quarter (¼), and said line produced, to the east line of Allen Avenue; thence to the southwest corner of lot two hundred and sixty seven (267), block five (5), Resurvey of Whipple's Second Addition; thence to the southeast corner of lot one hundred and eighty six (186) in said block; thence to the northwest corner of lot two hundred and thirty nine (239), block two (2), in said addition; thence to the northeast corner of said lot; thence to the northwest corner of lot fifty four (54) in said block; thence to the northeast corner of said lot fifty four (54); thence to a point on the west line of Mercier Place, where it is intersected by the center line of twentieth (20th) street produced from the east; thence along the center line of Twentieth street (20th) to the center line of Forest avenue north of Twentieth (20th) street; thence north along the center line of Forest avenue to the center of Independence avenue; thence east along the center line of Independence avenue, to the center line of Forest avenue north of Independence avenue; thence north and northwardly, along the center line of Forest avenue and said line produced to the center line of the main channel of the Missouri River; thence along the center line of the main channel of the Missouri River to the beginning.

Now, therefore, you and each of you are hereby notified that the sixth day of December, 1909, at two o'clock P. M., is the day, and the Lower House Council Chamber on the fourth floor of the City Hall Building, on the southeast corner of Fourth and Main Streets, in Kansas City, Jackson County, Missouri, is the place fixed for empaneling a jury to ascertain the compensation for the property to be taken, or damaged, and to make assessments to pay for the same.

And the court further orders that a copy of this order shall be published in the Daily Record, the newspaper at this time doing the city printing, for four (4) consecutive weeks, the last insertion to be not more than one week prior to the day set for said hearing; and that a copy of this order be served, as by the Charter of Kansas City provided, upon each and every resident of Kansas City, owning or having an interest in the real estate proposed to be taken or damaged.

A true copy of the original order.

JOHN McCORD,
Clerk Municipal Court of Kansas City.
HARRY G. KYLE,
Judge Municipal Court of Kansas City.

141 On the foregoing order issued by the court dated November 1, 1909, the following returns were made by N. D. Olson, police officer of Kansas City, as follows, to-wit:

"I hereby certify that I executed and served the within order and notice in Kansas City, Missouri, by delivering a copy thereof personally to each of the following owners and parties in interest, within

named. On the 5th day of October, 1909, to John C. Nerewith, Trustee Travellers' Insurance Company, of Hartford, James B. Welch, Trustee Kansas City Trust Company, Mara J. Tulier, Bert H. Fuller, Daniel B. Holmes, B. T. Whipple, trustee. J. T. W. Hairston. William P. M. Stevens. Aeleen James. Ellen S. Stevens. Charles R. Meyer. Sidney Smith, trustee. Carlin Lee. Della B. Frazier.

On the 6th day of October, 1909—Joseph C. Ford, Jemuel C. Gates. Frank Norton.

I hereby certify that I executed and served the within order and notice in Kansas City, Missouri, upon the following owners and persons in interest, by leaving a copy thereof for such owners and parties in interest at their usual place of abode with some member of their respective family over the age of 15 years. On the 6th day of October, 1909, John Houlihan. William Volker.

I hereby certify that I executed and served the within order and notice in Kansas City, Missouri, on Travellers' Insurance Company of Hartford by leaving a copy thereof at a business office of said company, with John C. Meredith, loan agent and person in charge of said business office. The President or chief officer being absent from Kansas City and Jackson County, this 5th day of October, 1909.

I hereby certify that I executed and served the within order and notice in Kansas City, Missouri, on Kansas City, Missouri, by leaving a copy thereof at the business office of said company, with T. T. Crittenden, Mayor, a person in charge of said business office, the President or other chief officer being absent from Kansas City and Jackson County, this 6th day of October, 1909.

I hereby certify that I have diligently searched, and that service cannot be made of the within order and notice, upon the following corporations respectively within named, either by delivering a copy thereof, to the President or other chief officer, of such corporation, with the person having charge thereof, within the limits of Kansas City, Jackson County, Missouri. The Western Investment Company, Christian Brothers College, of St. Louis.

I further certify that service cannot be made of the within notice in Kansas City, Missouri, upon the following property owners and parties within named; either by delivering a copy of such notice personally to such property owners and parties, or by leaving a copy at the usual place of abode of such property owners and parties, with a member of their respective families over the age of fifteen
142 years. Samuel C. Lee, Henry Gibhart. Edward A. Kelly and Otis Norcross, trustee under the will of Eunice M. Weeks. Otis Norcross. Eunice Weeks. Ada Forbus. Joshena Forbush. Maria Forbush. Fidelia O. Case. Flora Tuller Pinck. Lucilla Tuller Wagner. Oliver P. W. Bryant. John Bryant. George S. Bryant. William L. Bryant. Bessie Galloway. Justus H. Schwenson. J. T. W. Hairston. Agnes M. Hairston. Alice H. Moore. George G. Pierce. Carlin Lee. John M. Gunn.

Witness my hand this 6th day of October, 1909.

N. B. OLSEN,
Police Officer, Kansas City, Missouri."

Mr. Ball: Can't it be admitted, Mr. Petherbridge, without waiving any of your objections to the admissibility at all of this decree, that it was final; that no motions for a new trial were filed and no appeal taken; and that this decree, while you object to it on the grounds assigned, that it is really a final decree on that point?

Mr. Petherbridge: Don't the record show that?

Mr. Ball: It will be proving a negative. But, it is a fact that there wasn't any new trial or any appeal?

Mr. Petherbridge: I don't know.

The Court: It is a fact, that they proceeded according to the court's directions in that case.

Mr. Ball: You Honor did not make any directions to that effect in that case. Your Honor's decree was aliunde; but, Your Honor's opinion was that the supplemental proceeding would bring the matter up here for trial de novo.

The Court: Yes, the decree and verdict was just in favor of your clients, as it stood at that time.

Mr. Ball: But, there is nothing as to Your Honor's opinion in regard to the supplemental proceeding in the record.

The Court: I did not mean to make any decree on what the law didn't permit me to do.

Mr. Ball: Certainly not.

The Court: And I merely meant, as a whole, that they would have to proceed under the Charter in the supplemental proceedings before your client could be bound.

Mr. Watson: I think that Your Honor will find that the supplemental proceeding was not filed at that time.

The Court: That was filed after the injunction suit was brought in this court; and I intended at that time that they could not proceed further against the parties who made the application for the injunction, without supplemental proceedings.

Mr. Ball: And Your Honor had had in mind to say that that entire business was void, ab initio, in the decree; and, you did hold, that as far as these parties are concerned, they stand in a different attitude from those in the original proceeding.

143 The Court: I don't want to discuss that matter now.

To which ruling and action of the court the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Brumback: I want to make an objection on my own behalf. I object to the introduction of these papers and the record in this case No. 52754, for the reason that as between myself and the parties in that case it is res inter alios acta.

The Court: Overruled.

To which ruling of the court the defendant, Frank F. Brumback, then and there duly excepted.

Mr. Ball: We offer in evidence the entire record in that case, for the purpose of showing that nothing other or further was done in the case after the rendition of this final decree.

The Court: The objection to that will be overruled.

Mr. Petherbridge: Which one is Your Honor ruling on?

The Court: Both of them.

Mr. Petherbridge: The City wants to object to the introduction of the record in the case referred to, for the reason that it is incompetent, irrelevant and immaterial, and does not prove or tend to prove that the matters set up in the answer in this proceeding are res judicata.

The Court: Objection overruled.

Said records so offered in evidence, in cause No. 52574, are in the words and figures following, to-wit:

EXHIBIT "L-1."

(Record 306, Page 536.)

"536:

20th Day, January Term, 1911, Tuesday, January 31st, 1911.

52754.

UNION PACIFIC RAILWAY COMPANY et al., Plaintiffs,
v.
M. A. FLYNN et al., Defendants.

Now comes the Federal Investment Company, a corporation, the Edgewater Terminal Railway Company, a corporation, The New York Life Insurance Company, a corporation, James H. Sternberg, and The Leach Estate Company, a corporation, H. G. Kaill, Geo. S. Graham, James F. Mister, and Felix La Force, by their respective counsel, and each enter their appearance and their several applications to be made parties plaintiff herein, being heard by the court, and it appearing to the court, that said parties are in all respects similarly situated to the Union Pacific Railway Company, plaintiff, and are severally the owners of properties within the benefit district which have been assessed with benefits under the proceeding in controversy, it is ordered that said parties and each of them be, and are hereby made parties plaintiff herein, all of said parties adopt petition heretofore filed by Union Pacific Railway Company in this cause."

144 (Record 306—Pages 536 & 537.)

"536:

20th Day, January Term, 1911, Tuesday, January 31st, 1911.

52754.

UNION PACIFIC RAILWAY COMPANY et al., Plaintiffs,
v.
M. A. FLYNN et al., Defendants.

Now on this 31st day of January, 1911, come plaintiffs, Union Pacific Railway Company, Geo. S. Graham, H. G. Kaill, and James F. Mister, and Felix La Force, Federal Investment Company, Edgewater Terminal Railway Company, New York Life Insurance Company, James H. Sternberg, and the Leach Estate Company, by their respective counsel, and come also the defendants by their counsel, and this cause coming on regularly to be heard and the court having heard the evidence and heard and considered the arguments and briefs of counsel, and being fully advised in the premises, finds the issues in favor of the plaintiffs, and that plaintiff Union Pacific Railway Company is and was at the time of the proceedings in the Municipal Court, mentioned in the petition, the owner of the several tracts of land in said petition described; that at said time the plaintiff Federal Investment Company, was and is the owner of the following tracts of land fully described in the verdict and judgment record of the said Municipal Court, to-wit: Tracts assessed by bills numbered 8, 10, and 11, at page 14 of said record, tract assessed by bill number 13, at page 15 thereof, tract assessed by bill numbered 166 at page 27 thereof; tract assessed by bill numbered 1235 and 1236 at page 87 thereof; tract assessed by bill 2323 at page 151 thereof; that the plaintiff Edgewater Terminal Railway Company is and was at said times the owner of the following tracts described in said verdict and judgment record, to-wit: tracts assessed by bills numbered 2, 3, 4 and 5 at page 13 of said record; that plaintiff New York Life Insurance Company is and was at said times the owner of the following described properties assessed in said proceedings and judgment; beginning at the northeast corner of 9th street and Baltimore Avenue, Kansas City, Missouri, thence east 120 feet, thence north 60 feet, thence east 110½ feet to the west line of Delaware street, thence west along the north line of Delaware street 122.09 feet, thence west to the east line of Baltimore Avenue, thence south 180 feet to beginning; also lots 11 to 16, both inclusive, in Aldine Place, an addition; also lot 3 in Block 1, T. S. Case's addition, all in Kansas City, Missouri; that Plaintiff James H. Stern, is and was at said times the owner of the following described land assessed in said judgment proceedings, to-wit: Lots 21, 22, 23 and 24, and the west 16½ feet of Lot 25, Cottage Place, an addition to Kansas City, Missouri, being tracts assessed in bills numbers

2513 to 2517, both inclusive, in said proceedings and judgment; that plaintiff the Leach Estate Company, is and was at said times the owner of the north 25 feet of lot 177, in Block 18, Old Town, an addition to Kansas City, Missouri, and lot 22 in Block 8, King's
145 Resurvey of Hubbard's Addition to said city, and east 80⅔ feet of Lot 13 and south half of Lot 14 in Block 2, Lucas Place, an addition to said city, all of which tracts are assessed in said proceedings, verdict and judgment.

And the court further finds that none of said plaintiffs were served with notice or process of any kind in said proceedings in the Municipal Court; that none of said plaintiffs had any knowledge thereof or opportunity to be heard therein; that none of said plaintiffs entered appearance therein; in person or by agent or attorney, and none of them had any knowledge of the finding of said proceedings till long after the verdict therein had been rendered and confirmed and judgment thereon entered and the time within which app-als might have been taken therefrom had expired, and that said plaintiffs did not learn of said proceedings or of said verdict, confirmation and judgment until notified to pay their several assessments by the City Treasurer of Kansas City, Missouri, during the latter part of May, 1910; that said verdict was confirmed on the 7th day of March, 1910.

The court further finds that said proceedings, verdict, confirmation thereof, and judgment is as to these plaintiffs and each of them and as to their respective properties inoperative and of no effect and that the several assessments undertaken to be made and levied upon the plaintiffs' said several properties are void, and that said Municipal Court in said proceedings had and acquired no jurisdiction therein of the plaintiffs or any of them or of their said properties.

It is therefore, considered, ordered, adjudged and decreed by the court, that said assessments, in so far as they effect or purport to effect plaintiffs, or any of them or any of their said several properties, be and the same are hereby annulled and for naught held; that the several assessments against the respective properties aforesaid of the plaintiffs and each of them be and the same are hereby set aside and annulled; the Defendant- Kansas City, M. A. Flynn, City Clerk, U. L. Weary, Clerk of said Municipal Court, and the officers and agents of said City, be and they are each of them perpetually restrained and enjoined from making out, certifying or attesting any tax bills against the several properties of the plaintiffs or any of them under and by virtue of said assessments, and that plaintiffs have and recover from the defendant, Kansas City, the costs herein expended and have execution therefor."

Mr. Watson: There will be no question but what there was no motion for a new trial filed in that case, and no appeal was taken in that case? If there is any question about it, I will want to introduce the whole record to establish that fact.

The Court: I think that there is no question but what that is a fact.

146 THOMAS L. HEALEY, recalled as a witness on the part of the defendants testified further as follows:

Direct examination by Mr. Watson:

Q. Mr. Healey, can you tell from this record what amount of damages were assessed against the Gregory Wholesale Grocery House, over here at the corner of Delaware and Third Streets?

Mr. Lee: What was that?

Mr. Petherbridge: Damages assessed. We object to that because it is incompetent—if it was paid. If that assessment has been paid, the Supreme Court says that that is res adjudicata; and I understand it has been paid.

The Court: And if it has not been paid, then this jury will have to re-assess it.

Mr. Petherbridge: Yes, sir.

The Court: I don't think that is material. What is the purpose of it, Mr. Watson?

147 Mr. Watson: I want to show that, to show the inequality and injustice of that assessment. They only assessed four or five dollars against that concern; and they assessed property two or more miles away as high or higher than they did this wholesale grocery house down at 3rd & Main.

The Court: If that has been paid, the jury may not inquire into it.

To which ruling and action of the court the defendant Union Pacific Railroad Company and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Watson: I want to show the number of feet they have—that wholesale grocery house—and the amount assessed against it; and I want to show that on account of the gross inequality and injustice of that other jury, and by which they seek to bind down my client; and made the Union Pacific Railroad Company an unjust assessment. They assessed my client $2,600.00 more for railroad yards and nothing else—and they assessed that big wholesale grocery house standing on Main Street only four or five dollars. I want to show that assessment was grossly unequal and unjust and vicious, by the assessment in that case.

The Court: The objection will be sustained.

To which ruling and action of the court the defendant Union Pacific Railroad Company and the other defendants, severally, by their counsel then and there duly excepted.

Cross Examination waived.

(Witness excused.)

The Court: Is that all, gentlemen?

Mr. Langworthy: I want to call Mr. Moore.

148 Mr. Ball: If Your Honor please, in behalf of the Federal Investment Company I offer to show the value of the property taken, by this witness and others, to show by this witness and others that the value of the property taken would be much less than

it was assessed by the jury in the Municipal Court—figures which have been given to the jury.

Mr. Petherbridge: We object to that offer as incompetent, irrelevant and immaterial under the Statute, and under the Supreme Court's opinion.

The Court: Objection sustained.

To which ruling and action of the court the defendant, The Federal Investment Company, and the other defendants, severally, by their counsel then and there duly exeepted.

Mr. Ball: We except to the court's ruling in denying to the defendant the right to be heard upon the question of the value of the property taken, for the reason that under the Charter the people owning property in the Benefit District are entitled to a hearing on the entire case, both in the Municipal Court and in the Circuit Court on appeal, as provided by the Charter; and for the further reason that the Charter provides that whenever any party interested, whether he is the owner of property in the Benefit District or owner of property taken, appeals to the Circuit Court, the entire case shall be tried de novo; and for the further reason that this defendant is entitled to all of the rights that it would have had if it had been brought into the Municipal Court in the original proceeding; and the fact that it appealed in the supplemental proceedings, into which it was brought for the first time by process, does not deprive it of any of the rights it would have had if it had been brought into the original proceeding; and, the effect of its appeal, when taken, is the same as it would have been if it had been in the original proceedings and appealed from that; and for the further reason, that to deny this defendant a hearing on the inquiry of damages, is to deprive it of its property without due process of law, within the meaning of Section 2
149 of Article II of the Constitution of Missouri, and of the Fourteenth Amendment of the Constitution of the United States; and is denying it the equal protection of the law, as guaranteed by the Constitution of the United States in the Fourteenth Amendment.

The Court: Overruled.

To which action and ruling of the court the defendant, Federal Investment Company, and the other defendants, severally, by their counsel then and there duly excepted.

The Court: Is that all of the evidence, gentlemen?

Mr. Taylor: Wait a minute.

The Court: I am not going to allow you gentlemen to examine other witnesses that are put on. If you subpœna a witness, you can examine him when he is put on; but, I cannot allow each defendant to examine the witnesses put on by other defendants. We would never get through.

To which ruling and action of the court the defendant, Chicago Great Western Railway Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Taylor: I want to make an offer.

The Court: Yes.

Mr. Taylor: I offer to show by this witness, that even assuming that the amount of the damages allowed by the jury in the former

case is the standard that has to be taken in this case; that is, the proportion of those damages that have been assessed upon property that has already paid, is an unlawful and wrong proposition; this, for the reason that the defendants now in court have a right to be heard not only upon the question of the amount of damages that should be allowed, but also should be allowed to be heard on the question of how those damages should be distributed over the property in the Benefit District.

Mr. Petherbridge: The City objects to that as incompetent, immaterial and irrelevant.

The Court: Sustained.

To which ruling and action of the court the defendant, Chicago Great Western Railway Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Petherbridge: And, as not within the issues of this hearing, under the Supreme Court's decision.

The Court: Objection sustained. Stand aside.

To which ruling and action of the court the defendant, Chicago, Great Western Railway Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Taylor: And I also make the same objection as made by Mr. Ball.

The Court: Overruled.

To which ruling and action of the Court the defendant, Chicago Great Western Railway Company, and the other defendants, severally, by their counsel then and there duly excepted.

(Witness excused.)

150 FRANK F. BRUMBACK, called as a witness on the part of the defendants, having been duly sworn, testified as follows:

Direct examination by Mr. Watson:

Q. Mr. Brumback, you are a practicing lawyer here at the Bar?

A. Yes, sir.

Q. And you are a property owner on Sixth Street?

A. No, I am a property owner on Fifth Street; but I represent clients who own property on Sixth Street.

Q. And on what part of Sixth Street do you represent clients owning property on Sixth Street?

A. They own the whole block of ground between Sixth and Seventh and between Broadway and May Street.

Q. Where is that with reference to the land proposed to be taken for this widening of Sixth Street?

A. It is just across Broadway, east from the east end of the land taken for the widening of Sixth Street.

Q. And what is the location of that property, comparing the two?

A. They are practically similar locations, except upon one that they own it has a switch, proposed switch running up May Street from the Kansas City Southern Yards, which has since been built.

Q. When you say "they," who do you mean?

A. The clients who own the property.

Q. Now, are you familiar with what that property has been selling for on the market?

A. Yes, sir.

Mr. Petherbridge: The City objects to that as immaterial.

The Court: Proceed.

(By Mr. Watson:)

Q. Now, I will ask you to state what that property is worth per foot, and what it is selling for on the market per foot—last year and at the present time.

Mr. Petherbridge: The City objects to that as immaterial.

The Court: What is the purpose of that?

Mr. Watson: To show the amount assessed as being unjust—to establish the value of the property taken—which we claim we have a right to show under this proceeding.

The Court: Objection sustained.

To which ruling and action of the court the defendant Union Pacific Railroad Company, and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Watson: We offer to show that the value of that property taken would be far less than the value allowed by the jury; and we offer to show the sales and the value of the property offered for sale there, on this street there, to establish the market value of the property taken or sought to be taken as part of this proceeding.

Mr. Petherbridge: To which the city objects as incompetent, irrelevant and immaterial, and not within the decision of the Supreme Court as laid down in this matter.

151 The Court: Objection sustained.

To which ruling and action of the court the defendant Union Pacific Railroad Company and the other defendants, severally, by their counsel, then and there duly excepted.

The Witness: I want to say this: I own, myself, an undivided one-half of a lot on Grand Avenue, between 18th and 19th Streets. That lot is situated in the Benefit District, and is about, I should judge, a mile and a quarter from Sixth Street, which is proposed to be opened. Between that lot and 6th Street, where it is opened, intervenes the main business part of Kansas City—on Main Street, Walnut Street and Grand Avenue; and, any possible traffic that could come through Sixth Street would not affect that lot any more than it does any other lot in the City.

Cross-examination by Mr. Lee:

Q. That is within what we call the "business district" of Kansas City, is it not?

A. No—I wouldn't say that. I think the benefit in relation to that lot—if there is any benefit from opening Sixth Street—is the benefit that that lot shares with the property in that district, on account of the business that intervenes some twelve streets north and

south, and about seven streets east and west; and the lot on Grand Avenue there between 18th and 19th, has access by numerous cross streets between Sixth Street and the lot to any part of the city that it wants to go to.

Q. Including the West Bottoms?

A. Yes, sir.

Q. Twelfth Street is the only one, isn't it?

A. No—you can go down 18th Street right north of this lot, and down the Southwest Boulevard and to the West Bottoms.

Q. You have to go around the circle there at 24th Street?

A. No—that is not a "circle"—it is straight west.

Q. That wouldn't take you to the part of the West Bottoms near the present Union Station, or to those wholesale houses in that vicinity or St. Louis Avenue?

A. It would not be as direct a route, but it would be a convenient way—to come up Genesee or some of those streets.

Q. Then, coming back to my former question: The lot you own is within what is known as the business district of Kansas City, as it is growing?

A. "As it is growing"; but not within the largest retail part of the City.

Redirect examination by Mr. Watson:

Q. What you have said about your lot, would apply with reference to all of that property out to Forest Avenue?

A. Yes, sir.

Q. It has good cross streets east and west, and north and south?

A. Yes, sir.

Q. And no possible benefit could come to that property from the widening of Sixth Street as proposed?

152 A. I don't think so. In the next place, also—by going one block north you can go to Fifth Street—which is now a street fifty feet wide, as I understand.

Q. Eighty feet wide, isn't it?

A. Yes, eighty feet.

Recross-examination by Mr. Lee:

Q. Mr. Brumback, supposing a man living way out in the east part of the City, near Forest Avenue, wanted to go to Kansas City, Kansas with a load: Wouldn't the best way be a route by way of Sixth Street and the viaduct?

A. It would be his most natural route, yes, from that part of the City. But, if he didn't want to take a load of machinery—he would naturally go, as most people do, by that terrace that starts at the Southwest Boulevard, and come down by that drive on Kersey Coates Terrace. That would be the natural way to go.

Q. Supposing a man had a load of machinery in Kansas City, Kansas and wanted to bring it over to the southeast part of this Benefit District—say, over to Montgomery-Ward's; wouldn't he naturally come across the viaduct and around Sixth Street?

A. Yes.

Q. And then out to Montgomery-Ward's?
A. That would be the most natural way.
Q. And in that way it would be a benefit to the property?
A. That is where I don't think you are right. It don't seem quite that way to me—that it would be a special benefit to that property.
Q. Well, we will take it this way. Suppose Montgomery-Ward—that is a good illustration—had a team or big motor truck loaded at their warehouse out here at 20th and Harrison, and they wanted to deliver it over in Kansas City, Kansas. Wouldn't they naturally use this route by way of Sixth Street and the viaduct?
A. Undoubtedly, they would.
Q. And to that extent their property would be benefited?
A. I don't think if you offered their property for sale on the market, that anybody would give you a dollar more on that account.

Re-redirect examination by Mr. Ball:

Q. Mr. Brumback—if he did have to go that way he could squeeze through Fifth Street, couldn't he?
A. Yes, sir.

The Court: Wait a minute. I can't give you the time for that, gentlemen.

To which ruling and action of the court the defendant Federal Investment Company and the other defendants, severally, by their counsel then and there duly excepted.

Mr. Brumback: On behalf of myself, I want to offer to prove that in regard to the lot that was taken by the City at the Southwest corner of Sixth & Broadway—twenty feet on Sixth Street and forty feet on Broadway—that the amount allowed by the original
153 verdict was more than two and one-half times what property immediately across the street has sold for.

Mr. Petherbridge: The City objects to that as incompetent, irrelevant and immaterial; and, as not within the issues of this case as formulated by the Supreme Court in sustaining this matter.

The Court: Sustained.

To which ruling and action of the court the defendant Frank F. Brumback and the other defendants, severally, by their counsel then and there duly excepted.

154 *Rebuttal.*

Whereupon Kansas City, in rebuttal of defendant's evidence, then offered and introduced evidence oral and documentary in the words and figures following:

Mr. Petherbridge: I want to offer one little piece of evidence in rebuttal.

The Court: Proceed.

Mr. Petherbridge: In view of what was said about that tract of land which is within the West Park District, which is in part of this street as widened. The City offers in evidence resolution No. 8930, adopted by the Park Board of Kansas City, Missouri, in rela-

tion thereto, giving its consent that that part of the park may be taken and used as a part of Sixth Street.

Mr. Brumback: I object to that as incompetent; and, as beyond the power of the Park Board to divert the use of a park to the use of a street, any more than they could to any private use.

The Court: Overruled.

To which ruling and action of the court the defendant, Frank F. Brumback, and the other defendants, severally, by their counsel then and there duly excepted.

Said Resolution No. 8930 of the Board of Park Commissioners of Kansas City, Missouri, so offered in evidence was marked Exhibit "6" and is in the words and figures following, to-wit:

EXHIBIT "6."

"Resolution No. 8930.

Whereas, application has been made to the Common Council of Kansas City, Missouri, for the widening of Sixth Street in said City to the width of 100 feet between Broadway and Bluff Streets of said City, said widening to be made by the addition to the south side of said street as now established of a strip of land 40 feet wide, extending from the west line of said Broadway to the east line of Bluff Street in said city; and

Whereas, in carrying out the widening and construction of said street as aforesaid, it will be necessary to construct the same through upon and over a portion of Kersey Coates Terrace Park, to-wit, through, upon and over the north end of the said Kersey Coates Terrace Park, and

Whereas, by Section 37 of Article XIII of the Charter of Kansas City, it is provided that:

"No roads or streets shall be laid out or constructed through any park, except said Board of Park Commissioners shall lay out and construct, or permit the laying out and construction of the same,"

155 and

Whereas, this Board deems it advisable and necessary to permit the widening of said Sixth Street as aforesaid, therefore, be it resolved by the Board of Park Commissioners:

Section 1. That permission be, and the same is hereby given to the widening of said Sixth Street by ordinance so as to include within said street a strip of ground from and in the north end of said Kersey Coats Terrace Park aforesaid, described as follows, to-wit:

Beginning at the point of intersection of the south line of Sixth Street with the east line of Bluff Street; thence east one hundred and seventy-seven and seventy-five one hundredths (177.75) feet to a point in the south line of Sixth Street; thence south forty (40) feet; thence west parallel with the south line of Sixth Street to the east line of Bluff Street; thence northeasterly along the east line of Bluff Street to the point of beginning.

Section 2. That a certified copy of this resolution be delivered to the Common Council of Kansas City as notice to said Common Council of the recommendation and action of this board.

Mr. Brumback: I would like to add on to the statement I made there—that the property I spoke of on Grand Avenue, was Lot 439, McGee's Addition.

Mr. Petherbridge: That is all, Your Honor.

Here Kansas City, Missouri, rested its case.

Here the defendants rested their case.

Whereupon Kansas City, Missouri, asked the court to instruct the jury, and requested the court to give each of the following instructions:

"1."

"The jury are instructed that this is a supplemental proceeding to assess certain benefits, if any, in the matter of the proceedings to open and widen Sixth Street from Broadway to Bluff Street, under ordinance of Kansas City, No. 7539, approved February 8, 1911, which is supplemental to the proceedings under Ordinance No. 3209, approved October 19, 1909.

You have nothing to do with the assessment of the amount of the compensation for the land and improvements taken or damaged. That has been done by a former jury in the original proceedings to open and widen Sixth Street, the total of which amounts to $166,299.57. A part of that amount has been paid by property owners in the benefit district, whose land is chargeable with benefits; the tracts upon which such payments have been made are shown
156 on the map or plat of the benefit district introduced in evidence, but there still remains unpaid a balance of such compensation, amounting to $76,981.98, which has not been paid as benefits. To pay the remainder of such compensation you shall assess such amounts against the several lots and parcels of private property, exclusive of the improvements thereon, within the benefit district (and upon which no assessments have been heretofore paid, as above stated), as you may find same to be benefited by said improvements. Each lot or parcel of ground to be assessed with an amount bearing the same ratio to such balance as the benefit to each lot or parcel bears to the whole benefit to all the property assessed."

("Refused.")

"2."

"The jury are instructed that this is a supplemental proceeding to assess certain benefits, if any, in the matter of the proceedings to open and widen Sixth Street from Broadway to Bluff Street, under Ordinance No. 7539, approved February 8, 1911, which is supplemental to the proceedings under Ordinance No. 3209, approved October 19, 1909.

You have nothing to do with the assessment of the amount of the compensation for the land and improvements taken or damaged: that has been done by a former jury in the original proceeding to open and widen this street, the total of which amounts to $166,299.57. A part of that amount has been paid by the property own-

ers in the benefit district whose land is chargeable therewith; such payments are shown on the map or plat of the benefit district introduced in evidence; but there still remains a balance of such compensation amounting to $76,981.98, which has not been paid as benefits. This balance you may assess against the city generally, including any benefit to any property of the city within the benefit district, and against such of the remaining private property, lots, tracts and parcels of land, exclusive of the improvements thereon, in the benefit district, as you may deem is benefited, if any, and in the proportion which you may deem the same benefited, by the opening and widening of Sixth Street, and upon which no assessments have been paid under the original proceedings."

("Given.")

Which instruction numbered "2" the court gave over the objections of defendants, severally; and to which ruling and action of the court in giving said instruction so numbered the defendants, severally, by their counsel then and there duly excepted and still except.

And which instruction numbered "1" the court refused to give; and to which ruling and action of the court in refusing to give said instruction so numbered Kansas City, Missouri, by its counsel then and there duly excepted.

157 And thereupon the defendant, Federal Investment Company, asked the court to instruct the jury, and requested the court to give each of the following instructions:

"I."

"The court declares the law that the question of the reasonableness or unreasonableness of the condemnation Ordinance No. 3209 is a judicial question to be determined by the court, and under all the evidence the court finds that said ordinance and the benefit district therein prescribed is unreasonable and unjust and therefore invalid, and these proceedings should be dismissed."

("Refused.")

"II."

"The court declares the law that the so-called supplemental Ordinance No. 7539 is void for uncertainty and indefiniteness."

("Refused.")

"III."

"The court instructs the jury that the plea of the defendants, Federal Investment Company, the Edgewater Terminal Railway Company and the Union Pacific Railway Company, setting up in bar of these proceedings as to their respective properties the proceedings and final decree of this court in Cause No. 52754 entitled Union Pacific Railway et al. v. M. A. Flynn et al., is sustained, and that the several properties of said defendants can not be assessed to pay any of the damages awarded for the property proposed to be taken herein."

("Refused.")

"IV."

"If the jury find and believe from the evidence that the benefits to the city at large and the special benefits to all the property within the benefit district does not equal the damages heretofore awarded for the proposed taking of property for widening 6th Street from Broadway to Bluff Streets, or if the jury find that the damages so awarded exceeds in amount all such benefits as would accrue from such widening of 6th Street—then the jury will so state in their verdict and will assess no benefits in these proceedings."

("Given.")

"V."

"The jury are instructed that in determining the special benefit, if any, to be assessed against any piece of property, they are not allowed to assess any sum against any piece of property except such sum as they may find said property is actually and specially
158 benefited and enhanced in value, as distinguished from any general benefit such property may receive, if any, in common with other property of the city, by reason of the widening of 6th Street."

("Given.")

Which instructions numbers "IV" and "V" the court gave over the objections of all the other defendants, severally; and to which ruling and action of the court in giving said instructions so numbered, and to the giving of each one of them, all the other defendants, severally, by their counsel then and there duly excepted and still except.

And which instructions numbers "I," "II" and "III," and each and every one of them, the court refused to give*n;* and to which ruling and action of the court in refusing to give said instructions so numbered, and *in* the court's refusal to give each and every one of them, the defendant, Federal Investment Company, and all of the other defendants, severally, by their counsel then and there duly excepted and still except.

And thereupon the defendants, Union Pacific Railroad Company, George S. Graham, H. G. Kaill, and Felix La Force, severally, asked the court to instruct the jury, and requested the court to give each of the following instructions:

"1."

"The court instructs the jury that, under the pleadings and evidence in this case, the proceedings under Ordinance 3209 were adjudged null and void and of no force and effect as to the complainants in the suit of Union Pacific Railroad Co. et al. v. M. A. Flynn et al., introduced in evidence in this case, and that said judgment is res adjudicata upon the issues raised in said pleadings; and that the proceedings held under Ordinance 3209 were null and void as to the complainants mentioned in said suit of Union Pacific Railroad Co. et al. v. M. A. Flynn et al., for want of proper and legal notice,

and there was nothing left for which the city could bring supplemental proceedings as is attempted in this case; and you will therefore return a verdict against the city and in favor of the property owners who were parties to the said suit of Union Pacific Railroad Co. et al. v. M. A. Flynn et al."

("Refused.")

"2."

"The court instructs the jury that, under the pleadings and evidence and judgment read in evidence in the case of Union Pacific Railroad Co. et al. v. M. A. Flynn et al., that in and by such judgment, the said proceedings attempted to be begun and held under Ordinance 3209 read in evidence were adjudged to be null and void as to the property owned by said Union Pacific Railroad Co.
159 and others and sought to be assessed for benefits to pay the damages awarded under Ordinance 3209; and you are further instructed that, after said proceedings were held to be null and void in such suit as to the complainants therein, there was nothing to which the city could supplement the present proceedings; and you will therefore return a verdict in favor of the property owners of said district whose property is sought to be assessed to pay the unpaid damages awarded under Ordinance 3209."

("Refused.")

"3."

"The court instructs the jury that, under and by virtue of the provisions of the charter of Kansas City, Missouri, the property owners, owning property in the benefit district to be assessed to pay damages, have the right to be notified by proper and legal notice of the pendency of such proceedings to take private property and of the benefit district in which private property will be assessed to pay such damages; and you are further instructed that, in these supplemental proceedings, there was no valid notice given to the property owners in the benefit district whose property was to be assessed to pay damages under and by virtue of the provisions of Ordinance 3209 read in evidence; and you are therefore instructed that, to assess any benefits against the property of the property owners in the benefit district under these supplemental proceedings violates the provisions of the fourteenth amendment to the Constitution of the United States in that it is taking the defendants' property in the benefit district without due process of law and denying to them the equal protection of the law; and you will therefore return a verdict in favor of such property owner and against the city in this proceeding."

("Refused.")

Which instructions numbers "1," "2" and "3," and each and every one of them, the court refused to give; and to which ruling and action of the court in refusing to give said instructions so numbered, and in the court's refusal to give each and every one of them, the defendants, Union Pacific Railroad Company, George S. Graham, H. G. Kaill and Felix La Force, and all the other defendants, severally, by their counsel then and there duly excepted and still except.

And thereupon the defendant, St. Louis and San Francisco Railroad Company, asked the court to instruct the jury, and requested the court to give each one of the following instructions:

"1."

"The jury are instructed that under the pleadings and the evidence they will assess no benefits against the property of the St. Louis and San Francisco Railroad Company."

("Refused.")

160 "2."

"The jury are instructed that if you find that the property in the benefit district received no special benefit from the proposed widening of Sixth Street over and above the general benefit to the property of the city, then you will so report in your verdict and assess no benefits."

("Given.")

"3."

"The jury are instructed that if you find that the damages in this case exceed the benefits you will so report in your verdict and you will assess no benefit."

("Given.")

Which instructions numbers "2" and "3," and each of them, the court gave over the objections of all of the other defendants, severally; and to which ruling and action of the court in giving said instructions so numbered, and in the giving of each one of them, all of the other defendants, severally, by their counsel then and there duly excepted and still except.

And which instruction numbered "1" the court refused to give, and to which ruling and action of the court in refusing to give said instruction so numbered the defendant, St. Louis and San Francisco Railroad Company, and all of the other defendants, severally, by their counsel then and there duly excepted.

And thereupon the defendant, Kansas City Stock Yards Company of Missouri, asked the court to instruct the jury, and requested the court to give each one of the following instructions:

"1."

"The jury are instructed that under the pleadings and the evidence they will assess no benefits against the property of the Kansas City Stock Yards Company of Missouri."

("Refused.")

"2."

"The jury are instructed that if you find that the property in the benefit district received no special benefit from the proposed widening of Sixth Street over and above the general benefit to the property

of the city, then you will so report in your verdict and assess no benefits."

("Given.")

"3."

"The jury are instructed that if you find that the damages in this case exceed the benefits you will so report in your verdict and you will assess no benefit."

("Given.")

161 Which instruction numbered "1" the court refused to give; and to which ruling and action of the court in refusing to give said instruction so numbered, the defendant, Kansas City Stock Yards Company of Missouri, and all of the other defendants, severally, by their counsel then and there duly excepted and still except.

And which instructions numbers "2" and "3," and each of them, the court gave over the objections of all the other defendants, severally; and to which ruling and action of the court in giving said instructions so numbered, and each of them, all of the other defendants, severally, by their counsel then and there duly excepted and still except.

And thereupon the defendant, State Line Improvement Company, asked the court to instruct the jury, and requested the court to give each one of the following instructions:

"1."

"The jury are instructed that under the pleadings and the evidence they will assess no benefits against the property of the State Line Improvement Company."

("Refused.")

"2."

"The jury are instructed that if you find that the property in the benefit district received no special benefit from the proposed widening of Sixth Street over and above the general benefit to the property of the city, then you will so report in your verdict and assess no benefits."

("Given.")

"3."

"The jury are instructed that if you find that the damages in this case exceed the benefits you will so report in your verdict and you will assess no benefit."

("Given.")

Which instruction numbered "1" the court refused to give; and to which ruling and action of the court in refusing to give said instruction so numbered, the defendant, State Line Improvement Company, and all of the other defendants, severally, by their counsel then and there duly excepted and still except.

And which instructions numbers "2" and "3," and each of them, the court gave over the objections of all of the other defendants, severally; and to which ruling and action of the court in giving said instructions so numbered, and to the giving of each of them, all of the other defendants, severally, by their counsel then and there excepted and still except.

162 And thereupon the defendants, St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Burlington & Quincy Railway Company, Hannibal & St. Joseph Railway Company and Kansas City, St. Joseph & Council Bluffs Railroad Company, severally, asked the court to instruct the jury, and requested the court to give each one of the following instructions:

"1."

"The court instructs the jury that under the evidence in this case you can assess no benefits against any of the property of the Chicago, Burlington & Quincy Railroad Company lying within the benefit district herein."

("Refused.")

"2."

"The court instructs the jury that under the pleadings and the evidence in this case, you cannot assess benefits against any of the property lying within the benefit district herein."

("Refused.")

"3."

"The court instructs the jury that under the evidence in this case you can assess no benefits against any of the property of the St. Louis and Kansas City Land Company lying within the benefit district herein."

("Refused.")

Which instructions numbers "1," "2" and "3," and each and every one of them, the court refused to give; and to which ruling and action of the court in refusing to give said instructions so numbered, and in the court's refusal to give each and every one of them, the defendants, St. Louis and Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Burlington & Quincy Railway Company and Kansas City, St. Joseph & Council Bluffs Railroad Company, and all of the other defendants, severally, by their counsel then and there duly excepted and still except.

And thereupon the defendant, Missouri Pacific Railway Company, asked the court to instruct the jury, and requested the court to give the following instructions:

"1."

"The court instructs the jury that if you find and believe from the evidence in this case that the property of The Missouri Pacific Rail-

way Company will not be specially benefited by the proposed widening of Sixth Street, from the west line of Broadway to the
163 east line of Bluff Street over and above the general benefit to property in the city you will assess no benefits against the property of the said The Missouri Pacific Railway Company."

("Given.")

Which instruction numbered "1" the court gave over the objections of all the other defendants, severally; and to which ruling and action of the court in giving said instruction so numbered all of the other defendants, severally, by their counsel then and there duly excepted and still except.

And thereupon the defendant The Edgewater Terminal Company, asked the court to instruct the jury, and requested the court to give the following instructions:

"1."

"The court instructs the jury that if you find and believe from the evidence in this case that the property of The Edgewater Terminal Railway Company will not be specially ..... d by the proposed widening of Sixth Street, from the west line of Broadway to the east line of Bluff Street over and above the general benefits to property in the city you will assess no benefits against the property of the said The Edgewater Terminal Railway Company."

("Given.")

Which instruction numbered "1" the court gave over the objections of all the other defendants, severally; and to which ruling and action of the court in giving said instruction so numbered, all the other defendants, severally, by their counsel then and there duly excepted and still except.

And thereupon the defendant, Frank F. Brumback, asked the court to instruct the jury, and requested the court to give each one of the following instructions:

"I."

"The jury should not assess against lot four hundred and thirty-nine, McGee's Addition any benefits whatever. The evidence shows that it is too remote from the proposed improvement to be considered specially benefited above the benefit accruing to the public generally."

("Refused.")

"II."

"In determining the amount of benefits to be assessed in this proceeding the jury should not take into consideration what is the amount allowed in the original proceeding for the property
164 to be taken. The fact that in the original proceeding a certain amount was allowed for the property to be taken does not establish that the benefits if any arising from widening the street equal or exceed the amount allowed for the property to be taken."

("Refused.")

"III."

"Even though the amount of damages to be allowed for property to be taken has been fixed at a certain sum in the original proceeding still the city is not bound to pay for such property unless the said amount can be raised by assessing benefits according to the rules laid down in the other instructions and the fact that a certain amount has been allowed in the original proceeding for the property to be taken does not operate to finally take such property."

("Refused.")

"IV."

"Even if the amount to be paid for property to be taken has been fixed at a certain amount in the original proceeding yet the city is not bound to take or pay for such property."

("Refused.")

"V."

"In determining what benefits should be assessed against private property in this proceeding the jury should not assess any property with any greater amount than the benefit if any actually conferred by the widening of the street in question and this is so even if by so assessing benefits on all property upon which assessments shall be made in this proceeding the result would be that sufficient money would not be raised to pay the balance remaining unpaid of the damages allowed in the original proceeding."

("Given.")

"VI."

"If the jury find that the whole amount of damages allowed exceed the whole amount of the benefits to the City and to all the property in the benefit district then they should so report to the court and not proceed any further and in this proceeding the jury have the right to determine what are the benefits to the City and to all property in the benefit district for the purpose of so determining whether the damages exceed the benefits."

("Given.")

"VII."

"The court declares the law to be that under the pleadings and evidence introduced in this case the benefit district described
165 and established by ordinance 3209 read in evidence by the City is unreasonable and the jury will return a verdict in favor of the property owners whose property is sought to be charged in this proceeding."

("Refused.")

"VIII."

"In this proceeding the jury are not bound by the amount allowed in the original proceeding for taking and damaging the land at the southwest corner of Sixth and Broadway Streets, fronting twenty-two feet on the south line of Sixth Street and forty feet on

the west line of Broadway but may determine what is the actual market value of said tract of land and allow for that tract of land only the amount so found as such actual market value."
("Refused.")

Which instructions numbers "V" and "VI," and each of them, the court gave over the objections of all the other defendants, severally; and to which ruling and action of the court in giving said instructions so numbered, and each one of them, all of the other defendants, severally, by their counsel then and there duly excepted and still except.

And which instructions numbers "I," "II," "III," "IV," "VII" and "VIII," and each and every one of them, the court refused to give; and to which ruling and action of the court in refusing to give said instructions so numbered, and in the court's refusal to give each and every one of them, the defendant, Frank F. Brumback, and all of the other defendants, severally, by their counsel then and there duly excepted and still except.

And thereupon the defendant, Chicago Great Western Railway Company, asked the court to instruct the jury, and requested the court to give each of the following instructions:

"I."

"The court instructs the jury that there is no competent evidence before you of the amount of damages to owners of private property to be taken in this proceeding that is binding upon the Chicago Great Western Railway Company."
("Refused.")

"II."

"The court instructs the jury that it is your duty under the law to apportion the benefits, if any, among all the tracts or parcels of land in the benefit district in accordance with what you find to be the benefit, if any, to each separate tract or parcel in said dis-
166 trict, as well those upon the plat of which is marked the word 'paid' as all others."
("Refused.")

"III."

The court instructs the jury that before any benefits can in this proceeding be assessed against the property of the Chicago Great Western Railway Company, it is entitled under the provisions of the 14th Amendment to the Constitution of the United States and Section 30 of Article 2 of the Constitution of the State of Missouri, to introduce evidence and be heard upon the questi-ns (*a*) of the cost of the improvement in question to pay which such benefits are to be assessed and (*b*) of what proportion of the total benefit, if any, of said improvement should be assessed against other property in the benefit district, that upon the plat of which is marked the word 'paid' as well as all other property; and you are further instructed that inasmuch as said company has been denied

the right to introduce evidence or be heard upon said questions, you will not assess any benefit against said property of said company."

("Refused.")

Which instructions numbers "I," "II" and "III," and each and every one of them, the court refused to give; and to which ruling and action of the court in refusing to give said instructions so numbered, and in the court's refusal to give each one of them, the defendant, Chicago Great Western Railway Company, and all of the other defendants, severally, by their counsel then and there duly excepted and still except.

And thereupon the court, of its own motion and over the objections of all the defendants, severally, gave the jury the following instruction:

"1."

"In passing upon the issue as to whether or not the damages in this case exceed the benefits, the jury should not and must not be influenced by the fact that the damages have been determined by another jury in another proceeding. Private property must not be assessed in excess of the actual benefits accruing thereto, if any, as distinguished from the benefits accruing to the city in general."

("Given.")

To which ruling and action of the court in giving said instruction so numbered, of its own motion, all of the defendants, severally, by their counsel then and there duly excepted and still except.

(After discussion between court and counsel.)

167 Here the court adjourned the further hearing of this cause, for the jury to return their verdict, until Saturday, the 24th day of May, 1913, at 9:30 o'clock A. M.

SATURDAY, May 24th, 1913—9:30 a. m.

On Saturday, the 24th day of May, 1913, at 9:30 o'clock A. M., the court continued the further hearing of this cause, for the jury to return their verdict, until Monday, the 26th day of May, 1913, at 9:30 A. M.

MONDAY, May 26th, 1913—9:30 a. m.

And afterwards, to-wit: On Monday the 26th day of May, 1913, at 9:30 o'clock A. M., and at the May Term, 1913, of said Circuit Court, the hearing of this cause was resumed and the following further proceedings had, to-wit:

Mr. Petherbridge: I wish to offer in evidence some parts of the record in the original proceeding, showing what property was damaged, the verdict, and the judgment of the court.

The City offers first in evidence the record in the original proceeding showing wherein the property owners were damaged, and which shows also what property owners were personally served.

Said record being in words and figures following, to-wit:

(Clerk copy.)

Mr. Petherbridge: I now offer the verdict of the jury in the orig-

inal proceeding, showing what property was assessed, and the damages to the remainder, and the judgment of the court thereon.

Mr. Ball: If that is meant as a statement of the testimony, I object to it, as entirely too general. Judge, I think it is too general, and the records should not be encumbered with unnecessary proceedings.

Court: I think it is unnecessary to encumber the record with that.

(Paper marked Exhibit "1-A" for identification.)

Mr. Petherbridge: The City offers in evidence the return of the officer in the original proceedings, showing what parties were served in person, together with the proceedings contained on pages 325 and 326 of the records of the Municipal Court of Kansas City, Missouri, it being Record "A-1," and containing a full and complete transcript of the records and proceedings of "In the Matter to Open and Widen Sixth Street," being Ordinance No. 3209.

Mr. Ball: Defendants object to the testimony offered from the record of the Municipal Court, for the reason that it is not the original process and return in that case, but is a portion of the record
168 entry made in the municipal court, which purports to copy the certificate of service of some police officer, and is not the original process and return in the case.

Mr. Petherbridge: I offer to prove in connection with this record of the return of the officer, that I have made diligent search among the files of the court in that proceeding, and have been unable to find the original return of the officer, but the return that is offered is the recorded return—verbatim—of the officer.

Court: You may require the municipal judge to make a finding of record as to who were personally served and who were not.

Mr. Petherbridge: No, sir.

Court: No such a requirement as that?

Mr. Petherbridge: No, sir.

Court: Then this would not be binding.

Mr. Petherbridge: I offer this return of the officer, because it is the only return that I can get hold of, the original return and papers being lost, and I offer this as a copy of the original.

Court: You have not made the necessary preliminary proof in order to introduce that. I don't know whether the attorneys will require any more from you than that you have made diligent search.

Mr. Ball: I will take Mr. Petherbridge's statement as to that.

J. C. Petherbridge, called as a witness on the part of the plaintiff, having been duly sworn testified as follows:

Direct examination by Mr. Lee:

Q. You are assistant city counsellor?

A. Yes, sir.

Q. You represent Kansas City in this proceeding?

A. Yes, sir.

Q. Have you made any effort, have you looked among the files in this case to see if you could find the original return of the officer?

Court: You are not the regular custodian of the files?

Witness: I searched in connection with the regular custodian, I made the search in his presence.

Court: You ought to have the regular custodian of the papers here.

CLARENCE TRIGG, called as a witness on the part of the plaintiff, having been duly sworn testified as follows:

Direct examination by Mr. Petherbridge:

Q. Your name is Clarence Trigg?

A. Yes, sir.

Q. You are the clerk of the Municipal Court of Kansas City, Missouri?

A. Condemnation and grading clerk.

169 Q. You are custodian and have charge of the records of that court?

A. Yes, sir, of both courts.

Q. Have you the custody and charge of the original files in the proceeding to open and widen Sixth Street from Broadway to Bluff?

A. Yes, sir.

Q. Have you examined those files to ascertain whether or not the original notice and return of the officer thereto, showing what parties were served, is on file, under Ordinance 3209?

A. Yes, sir.

Q. Have you been able to find the original return of the officer in that proceedings?

A. I cannot find it.

Court: Did you write the record in this case?

Witness: I did not write the original.

(By Mr. Petherbridge:)

Q. Is it the practice to make a record of the returns made by officers, showing who is served?

A. Yes, sir, a verbatim record.

Q. And that was preserved in the records in this case?

A. Yes, sir.

Q. And does that appear in this recorded record, it being "A-1" at pages 325 and 326, and which is a copy of the original return of the officer who served the parties in this case?

A. Those pages show what appear there.

Q. Just state whether or not that is the record that was kept, at that time?

A. That is the record.

Mr. Petherbridge: The City offers in evidence the return of the officer in the original proceeding in this matter, under Ordinance 3209 of Kansas City, Missouri, contained on pages 325 and 326 of the records of the Municipal Court of Kansas City, Missouri, showing what parties were served in this proceeding.

Mr. Ball: Defendants make the same objection as heretofore made.

Court: The objection will be overruled.

To which ruling and action of the court defendants, severally, by their counsel then and there duly excepted.

Said record, marked Exhibit "1-A," being in the words and figures following, to-wit:

EXHIBIT "1-A."

"On the foregoing order issued by the court, dated November 1st, 1909, the following returns were made by N. B. Olson, a police officer of Kansas City, upon the owners whose property is to be taken or damaged in these proceedings, as follows:

I hereby certify that I executed and served the within order and notice in Kansas City, Missouri, by delivering a copy thereof personally to each of the following owners and parties in interest, within named: On the 5th day of November, 1909, to John C. Meri-
170 deth, trustee Travelers' Insurance Company of Hartford; James B. Welch, trustee Kansas City Trust Company; Mara J. Tuller, Bert H. Tuller, Daniel B. Holmes, B. T. Whipple, trustee J. T. W. Hairston; Wm. P. M. Stevens, Aeleen James, Ellen S. Stevens, Charles R. Meyer, Sidney Smith, trustee for Carolyn Lee; Della B. Frazier.

On the 6th day of November, 1909, to Joseph C. Ford, Jennel C. Gates, Frank Norton.

I hereby certify that I executed and served the within order and notice in Kansas City, Missouri, upon the following owners and parties — interest, by leaving a copy thereof for such owners and parties in interest at their usual place of abode with some member of their respective family over the age of 15 years. On the 6th day of November, 1909, John Huliban, Wm. Volker.

I hereby certify that I executed and served the within order and notice in Kansas City, Missouri, on Travelers' Insurance Company of Hartford, by leaving a copy thereof at a business office of said company with John C. Merideth, loan agent, a person in charge of said business office, the president or other chief officer being absent from Kansas City and Jackson County, this 5th day of November, 1909.

I hereby certify that I executed and served the within order and notice in Kansas City, Missouri, on Kansas City, Missouri, by leaving a copy thereof at a business office of said city with T. T. Crittenden, mayor, a person in charge of said business office, the president or other chief officer being absent from Kansas City and Jackson County, this 6th day of November, 1909.

I hereby certify that I have made diligent search, and that service cannot be made of the within order and notice, upon the following corporation, respectively, within named, either by delivering a copy thereof to the president or other chief officer of such corporation, or in his absence by leaving a copy thereof at any business office of such corporation with the person having charge thereof within the limits of Kansas City, Jackson County, Missouri. The Western Investment Company, Christian Brothers' College of St. Louis.

I further certify that service cannot be made of the within notice

in Kansas City, Jackson County, Missouri, upon the following property owners and parties within named, either by delivering a copy of such notice personally to such property owners and parties, or by leaving a copy at the usual place of abode of such property owners, and parties with a member of their respective families over the age of 15 years: Samuel C. Lee, Henry Gibhard, Edward A. Kelly and Otis Norcross trustees under Eunice M. Weeks, Otis Norcross, Eunice Weeks, Ada Forbush, Joshena Forbush, Maria Forbush, Fidelia O. Case, Flora Tuller Pinck, Lucille Tuller Wagner, Oliver P. W. Bryant, John Bryant, George S. Bryant, Wm. L. Bryant,
171 Bessie Calloway, Justus H. Schwenston, J. T. W. Hairston, Agnes M. Hairston, Alice H. Moore, George G. Pierce, Carolyn Lee, John M. Gunn.

Witness my hand this 6th day of November, 1909.

N. B. OLSON,
Police Officer, Kansas City, Missouri."

Here Kansas City, Missouri, rested its case.
Here the defendants rested their case.

Thereupon Kansas City, Missouri, asked the court to further instruct the jury, and requested the court to give the following additional instruction:

"1."

"Upon your request for further instruction in regard to your duties as to assessing benefits in this proceedings, you are instructed that you may not assess any benefits in this supplemental proceeding against any property in the benefit district which was adjudged in the original proceeding to have been damaged by reason of a part thereof being taken for the widening of Sixth Street from Broadway to Bluff Street."

("Given.")

Which instruction numbered "1" the court gave over the objections of all the defendants, severally; and to which ruling and action of the court in giving said instruction so numbered the defendants, severally, by their counsel then and there duly excepted and still except.

Here the court adjourned the further hearing of this cause, for the filing of verdict by jury, until Saturday, June 28th, 1913, at 9:30 o'clock A. M.

SATURDAY, June 28th, 1913—9:30 a. m.

On Saturday, the 28th day of June, 1913, at 9:30 o'clock A. M., and at the May Term, 1913, of said Circuit Court, the court resumed the hearing of this cause and the following further proceedings were had, to-wit:

Thereupon the jury filed their verdict in said cause, which said verdict is in the words and figures following, to-wit:

(Said verdict is covered by stipulation printed as part of the record herein.)

172 And afterwards, and within four days from the rendition of the verdict in said cause, to-wit, on Tuesday the 1st day of July, 1913, and at said May term, 1913, of said Circuit Court, the defendants, St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Burlington & Quincy Railway Company, Hannibal & St. Joseph Railway Company and Kansas City, St. Joseph & Council Bluffs Railway Company filed their motion for a new trial in said cause in the words and figures following, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City, May Term, 1913.

No. 60282.

In the Matter of the Condemnation Proceedings for the Widening of Sixth Street from Broadway to Bluff Street.

Motion for New Trial on Behalf of Defendants, St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Burlington & Quincy Railway Company, Hannibal & St. Joseph Railway Company and Kansas City, St. Joseph & Council Bluffs Railroad Company.

Now come the defendants, St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Burlington & Quincy Railway Company, Hannibal & St. Joseph Railway Company and Kansas City, St. Joseph & Council Bluffs Railroad Company, and jointly and separately move the court to set aside the verdict of the jury herein, and grant them and each of them a new trial of said cause for the following reasons:

1. The court committed error in overruling the motions made by and on behalf of these defendants and each of them to dismiss said proceedings before the empanelling of the jury herein.

2. The court committed error in overruling the objections interposed by and on behalf of these defendants and each of them to the empanelling of a jury in said cause, which said objections were made prior to the empanelling of the jury herein.

3. The court committed error in overruling the objections to the introduction of any testimony herein interposed by and on behalf of these defendants and each of them at the beginning of the trial of said cause.

4. Because the court overruled the motions to dismiss said proceedings made by and on behalf of these defendants and each of them at the beginning of the trial of said cause.

5. Because the court committed error in admitting incompetent, irrelevant and immaterial evidence in said cause over the objections and exceptions made by and on behalf of these defendants and each of them.

6. Because the court committed error in the exclusion of competent, relevant and material testimony and evidence offered by and on behalf of these defendants and each of them.

173 7. Because the court committed error in refusing to dismiss said proceedings at the close of the trial as requested by and on behalf of these defendants and each of them.

8. Because the court committed error in refusing to give the instructions and each of the instructions requested by and on behalf of these defendants and each of them, at the close of the entire case.

9. Because the court committed error in giving to the jury the instructions which it did give on behalf of Kansas City.

10. Because the verdict is against the greater weight of the evidence.

11. Because the verdict is grossly excessive as to these defendants and each of them.

12. Because the verdict of the jury is against the law and the evidence.

13. Because the verdict of the jury is the result of bias, passion and prejudice on the part of the jury.

14. Because said verdict, if allowed to stand, will result in the taking of property belonging to these defendants and each of them, without due process of law, in violation of Section 30, of Article II of the Constitution of the State of Missouri, and in violation of the 5th and 14th Amendments to the Constitution of the United States.

15. Because the ordinance under and by virtue of which the above proceedings were had, is void, and in violation of and contrary to the provisions of the City Charter of Kansas City.

16. Because these defendants have never been served with process in the original proceeding herein, under Ordinance No. 3209, as required by the City Charter of Kansas City, and said proceedings are therefore void as to them and each of them.

17. Because the court committed error in refusing to hold as a matter of law that the Benefit District provided for in the ordinance under and by virtue of which these proceedings were had, was and is unreasonable, unjust and oppressive.

18. Because these defendants and each of them have not had their day in court and have had no opportunity to be heard, as to the proceedings for the assessment of damages sustained by reason of the widening of Sixth Street, and by reason thereof, have been and will be deprived of property without due process of law, in violation of Section 30 of Article II, of the Constitution of the State of Missouri, and in violation of the 5th and 14th Amendments of the Constitution of the United States.

(Signed) WARNER, DEAN, McLEOD & TIMMONDS,
Attorneys for Defendants, St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Burlington & Quincy Railway Company, Hannibal & St. Joseph Railway Company, and Kansas City, St. Joseph & Council Bluffs Railroad Company."

174 And afterwards, and on the same day, and within four days from the rendition of the verdict in said cause, to-wit, on Tuesday, the 1st day of July, 1913, and at said May term, 1913, of said Circuit Court, the defendant, The Chicago, Rock Island & Pacific Railway Company, filed its motion for a new trial in said cause, in the words and figures following, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City, May Term, 1913.

No. 60282.

In the Matter of the Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street.

Separate Motion of the Chicago, Rock Island and Pacific Railway Company for a New Trial.

Now comes the Chicago, Rock Island & Pacific Railway Company and moves the court to set aside the verdict and grant a new trial in the above entitled cause for the following reasons, to-wit:

1. The verdict is against the law.
2. The verdict is against the evidence.
3. The verdict is against the law and the evidence.
4. The verdict is against the weight of the evidence.
5. The verdict is so against the weight of the evidence as to show that it was arrived at through bias, prejudice, passion or sympathy.
6. There is not sufficient evidence to warrant a verdict against this defendant.
7. The verdict was arrived at by the jury through conjecture or speculation.
8. The verdict against this defendant is excessive.
9. The verdict against this defendant is so excessive as to show that it was arrived at through bias, prejudice, passion or sympathy.
10. The court committed error in admitting incompetent, irrelevant and illegal evidence on the part of the plaintiff.
11. The court committed error in overruling and refusing to give the demurrer offered at the request of this defendant at the close of all the evidence.
12. The court committed error in giving the instructions, and each of them, that were given in behalf of the plaintiff.
13. The court committed error in refusing the instructions, and each of them, that were offered by this defendant and refused by the court.
14. The court committed error in refusing the instructions, and each of them, that were modified by the court, and in giving said instructions, and each of them, as modified by the court.
15. The court committed error in giving the instructions, and each of them, that were given by the court of its own motion.

175 16. The proceedings under Ordinance No. 3209 of Kansas City, Missouri, approved October 19th, 1909, are illegal and of no effect, and not binding upon this defendant.

17. The proceedings under Ordinance No. 7539 of Kansas City, Missouri, approved February 18th, 1911, are void, illegal and of no effect as to this defendant.

18. The publication notice in the proceedings under said Ordinance No. 3209 of Kansas City, Missouri, was defective, illegal, insufficient and did not confer any jurisdiction upon the court so far as this defendant is concerned.

19. The publication notice in the proceedings under said Ordinance No. 7539 of Kansas City, Missouri, was defective, illegal, insufficient and did not confer any jurisdiction upon the court so far as this defendant is concerned.

20. Said Ordinance No. 7539 is too vague, indefinite and uncertain in its terms and does not specify any particular error, defect or omissions in said original Ordinance No. 3209, which said Ordinance No. 3209, Ordinance No. 7539 was passed with a view of correcting.

21. The benefit district prescribed in said Ordinance No. 3209 and said Ordinance No. 7539 is excessive in that it includes too much property or territory.

22. The benefits assessed under said original Ordinance No. 3209 and under said Ordinance No. 7539 are far in excess of any possible benefit that can arise either to the city at large or to any property holder or person within the benefit district.

(Signed) PAUL E. WALKER,
(Signed) SEBREE, CONRAD & WENDORFF,
Attorneys for Defendant The Chicago, Rock Island and Pacific Railway Company."

And afterwards, and within four days from the rendition of the verdict in said cause, to-wit, on Wednesday, the 2nd day of July, 1913, and at said May term, 1913, of said Circuit Court, the defendants, Union Pacific Railroad Company, George S. Graham, H. G. Kaill and Felix La Force, filed their motion for a new trial in said cause, in the words and figures following, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 60282.

In the Matter of Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street.

Motion of Defendants, Union Pacific Railroad Company, George S. Graham, H. G. Kaill, and Felix La Force for New Trial.

Now comes the defendants, Union Pacific Railroad Company, George S. Graham, H. G. Kaill and Felix La Force, within four days allowed by law after the verdict and judgment rendered
176 in the proceedings herein, and move the court to set aside said verdict and judgment therein, and to grant a new trial to these defendants for the following reasons:

(1) Because the court erred in overruling defendants' motion to dismiss the supplemental proceedings herein, for the reasons stated in said motion.

(2) Because the court erred in overruling defendants' objection to the introduction of any evidence under Ordinance No. 7539 authorizing supplemental proceedings, and all proceedings thereunder for the reason that the said ordinance and said proceedings thereunder are wholly insufficient on which to base any proceedings, as appears upon the face of said ordinance, and because said ordinance does not comply with the charter provisions of Kansas City, Missouri, and does not describe what property has been omitted from the assessment under the original proceedings or what property was sought to be taken under said original proceedings or what property was benefited by said original proceedings, and for which supplemental proceedings were instituted, and because the said ordinance and proceedings thereunder do not comply with the charter provisions of Kansas City, Missouri, authorizing supplemental proceedings, and because there were no valid proceedings under Ordinance No. 3209 to supplement.

(3) Because the court erred in holding that the proceedings under Ordinance No. 3209, to which supplemental proceedings were instituted, were valid and could be supplemented by said supplemental proceedings, for the reason that, under the pleadings, evidence and decree introduced in the case of Union Pacific Rd. Co. et al. v. M. A. Flynn et al., it was shown that the court had already held such proceedings under Ordinance No. 3209 null and void, and therefore there was nothing to supplement under and by virtue of the charter provisions of Kansas City, Missouri, and the court erred in holding that there were any proceedings of any validity in said of which supplemental proceedings could be instituted.

(4) Because the court erred in overruling defendants' objection to the introduction of any evidence under said supplemental proceedings, for the reason that, under and by virtue of said proceedings, the said Kansas City deprived the defendants of their rights to a valid notice of the pendency of said proceedings under Ordinance No. 3209, as provided in Section 2 of Article 6 of the Charter of Kansas City, Missouri, which requires the said city in such condemnation proceedings to give notice by publication for four consecutive weeks, which was not done in said original proceedings, and that such failure to give such notice as required by the provisions of the Charter of Kansas City, Missouri, as aforesaid, deprived these defendants of their rights to appear, introduce evidence, and be heard in said proceedings as to the amount of damages to
177 be awarded for which their property would be assessed benefits, and were thereby deprived of a hearing in said proceedings which was given by said charter provisions aforesaid, and that the ruling of the court in these supplemental proceedings deprived these defendants of their right to be heard in said original proceedings, and also in these supplemental proceedings on the question of damages sustained for which the defendants' property was and is assessed benefits and, in so ruling, this court deprived these defend-

ants of their right to a hearing and the right to introduce testimony in said cause before said jury, in violation of Section 2 of Article 6, and Section 3 of Article 6, and Section 6 of Article 6 of the Charter of Kansas City, Missouri, and deprived these defendants of their property without due process of law, and denied to them the equal protection of the law, in violation of the Constitution of the State of Missouri, and also in violation of Section 1 of Article 14, Amendments to the Constitution of the United States, and these defendants here and now invoke the protection of said constitutional provisions of the State of Missouri, and also Section 1 of Article 14, Amendments to the Constitution of the United States as a defense to the proceedings under the supplemental ordinance herein.

(5) Because, under the proceedings under the original ordinance No. 3209, the failure of the said Kansas City to give defendants the notice required by Section 2 of Article 6 of the charter of Kansas City, Missouri, rendered any judgment against these defendants' property null and void, and the court so adjudged in the case of Union Pacific Rd. Co. et al v. M. A. Flynn et al., introduced in evidence, and, in so holding that the said Kansas City could supplement said original proceedings by Ordinance No. 7559 and the proceedings thereunder, and that the defendants could not be heard to introduce any evidence showing the amount of damages to the property taken and for which benefits were assessed against these defendants' property, the court deprived these defendants of their right to introduce any evidence as to the amount of damages, in violation of Section 3 of Article 6 of the Charter of Kansas City, Missouri, and in so ruling, the court deprived these defendants of their property without due process of law, and denied to these defendants the equal protection of the law, in violation of Section 1, Article 14, Amendments to the Constitution of the United States, and these defendants here and now invoke the protection of said Section 1 of Article 14 of the amendments to the Constitution of the United States as a defense to the verdict and judgment in this case against these defendants.

(6) Because the court erred in holding that these defendants could not introduce any evidence before the jury showing the value of the property sought to be condemned under original Ordinance No. 3209 and the proceedings thereunder, and, in so ruling, this court denied these defendants the right of defense given under and by virtue of Section 3 of Article 6 of the Charter of Kansas
178 City, Missouri, which is and was a property right, and, in so denying such right to these defendants, the court deprived these defendants of their property without due process of law, in violation of Section 1, Article 14, Amendments to the Constitution of the United States, and also denied to these defendants the equal protection of the law guaranteed by the said Section 1 of Article 14, Amendments to the Constitution of the United States, and these defendants here and now invoke the protection given by said Section 1 of Article 14, Amendments to the Constitution of the United States, as a defense to the verdict and judgment rendered herein.

(7) Because the court erred in holding that the proceedings

under Ordinance No. 3209 were valid and binding on these defendants in these supplemental proceedings, and that such original proceedings could be supplemented by these supplemental proceedings, for the reason that, under the pleadings, evidence and decree in the case of Union Pacific Rd. Co. et al. v. M. A. Flynn et al., introduced in evidence, the court had already decreed and decided that the proceedings under Ordinance No. 3209 as to these defendants were null and void, and enjoined the issuance of any tax bills thereunder against the property of these defendants, and such decree is and was a final decree unappealed from, and is and was res adjudicata as against the said Kansas City in these supplemental proceedings as to these defendants, and the court erred in holding that said decree did not estop the said Kansas City in such supplemental proceedings which it had already adjudged null and void, and therein the court erred against the right of these defendants.

(8) Because the court erred in giving each and every instruction given on behalf of Kansas City herein.

(9) Because the court erred in giving each and every instruction on behalf of the persons owning property sought to be taken under said Ordinance No. 3209, and herein the court erred against the rights of these defendants.

(10) Because the court erred in refusing to give each and every instruction asked by these defendants and refused by the court, and in refusing to give each and every one of said instructions so requested by these defendants, the court erred against the rights of these defendants.

(11) Because the court erred in giving each and every instruction given at its own motion.

(12) Because the court erred in modifying the instructions requested by these defendants, and then erred in giving each and every one of said instructions so modified by the court and given in such modified form.

(13) Because the court erred in excluding legal and competent evidence offered by these defendants.

(14) Because the court erred in admitting illegal, incompetent and immaterial evidence offered by said Kansas City over the objections and exceptions of these defendants.

179 (15) Because the court erred in refusing to instruct the jury, that, under the pleadings, evidence and decree in the case of Union Pacific Rd. Co. et al. v. M. A. Flynn et al., introduced in evidence, the said Kansas City was estopped by said decree from claiming said original proceedings under Ordinance No. 3209 had any validity whatever, and, in so holding, the said decree was not res adjudicata against the said Kansas City in favor of these defendants, the court erred to the prejudice of these defendants.

(16) Because the verdict and judgment thereon are against the law and the evidence, and the weight of the evidence.

(17) Because the verdict is excessive as to the defendant Union Pacific Railroad Company.

(18) Because the verdict is excessive as to the defendant George S. Graham.

(19) Because the verdict is excessive as to the defendant H. G. Kaill.

(20) Because the verdict is excessive as to the defendant Felix La Force.

(21) Because, under the pleadings and the evidence in this case, the verdict and judgment should have been for these defendants.

(22) Because the verdict is the result of passion and prejudice on the part of the jurors herein.

(23) Because, under the proceedings herein and the proceedings under Ordinance No. 3209, introduced in evidence, these defendants have been denied a hearing in this court as to the amount of damages to be awarded for the property sought to be taken, and the benefits assessed against the property of these defendants, and they have been deprived of their property without due process of law, and been denied the equal protection of the law, and the equal protection of rights given under the charter of Kansas City, Missouri, all in violation of Section 1 of Article 14, Amendments to the Constitution of the United States, and these defendants have and now invoke the protection of said Section 1 of Article 14, Amendments to the Constitution of the United States, as a defense to any assessment of benefits made under the proceedings herein.

(24) Because the court erred in instructing the jury that they could not assess any benefits against that part of the property remaining after they had taken a part in condemnation proceedings under Ordinance No. 3209, and that these defendants could not question or show the amount of damages which should be assessed, or show the amount of benefits to be assessed against said property in these supplemental proceedings, and, in so ruling, the court deprived these defendants of their property without due process of law, and denied these defendants the equal protection of the law, all in violation of Section 1, Article 14, Amendments to the Constitution of the United States, and these defendants here
180 and now invoke the protection of said Section 1, Article 14, Amendments to the Constitution of the United States, as a defense to the proceedings herein.

(25) Because said Ordinance No. 3209 is void on its face.

(26) Because said supplemental ordinance is void on its face, for indefiniteness, uncertainty and vagueness.

(28) Because the court erred in instructing the jury in the proceedings under Ordinance No. 3209 on the question of damages, in that it violated the constitutional provision which provides for assessing only just compensation, and did not confine the jury to what the Constitution meant by just compensation, but the instructions in this case gave the jury a roving commission to go outside of the said constitutional provision and take into consideration elements of damage not provided in and by the Constitution of the State of Missouri, and herein the court erred to the prejudice of these defendants.

Wherefore, these defendants pray the court to grant them a new trial for the foregoing reasons.

(Signed) WATSON & WATSON,
Attorneys for Defendants Union Pacific R'd Co., George S. Graham, H. G. Kaill, and Felix La Force."

And afterwards, and on the same day, and within four days from the rendition of the verdict in said cause, to-wit: On Wednesday, the 2nd day of July, 1913, and at said May Term, 1913, of said Circuit Court, the defendant, Union Depot Bridge & Terminal Railroad Company, filed its Motion for a New Trial in said cause, in the words and figures following, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City, — Term, 1913.

No. 60282.

In the Matter of the Supplemental Proceedings for Opening and Widening of Sixth Street from the East Line of Bluff Street to the West Line of Broadway.

Comes now Union Depot Bridge & Terminal Railroad Company and moves the court to set aside and hold for naught the verdict of the jury rendered herein on the 28th day of June, 1913, and to grant it a new trial and rehearing for the reason:

The Union Depot Bridge & Terminal Railroad Company is the owner and in possession of the following described lots, tracts and parcels of land, is in the benefit district as prescribed by the Ordinance No. 3209, approved the 19th of October, 1909, to-wit:

Beginning on the North line of Fourth Street at the Southwest corner of Lot One (1), Block "A" Old Town Reservation; thence northeasterly along the North line of Front Street Nine hundred fifty (950) feet to the Southeast corner of Lot Ten (10),
181 Block "B" Old Town Reservation; thence Northwesterly One hundred twenty (120) feet; thence northeasterly fifty (50) feet; thence Southeasterly One hundred twenty (120) feet to the Southwest corner of Lot One (1), Block "C"; thence Northeasterly Three Hundred (300) feet to the Southeast corner of Lot One (1), Block "C"; thence Northwest One Hundred Twenty (120) feet; thence Northeast Fifty (50) feet; thence Southeasterly One hundred twenty (120) feet to the Southwest corner of Lot One (1), Block "D"; thence Northeasterly along the North line of Front Street Two hundred fifty (250) feet to the Southeast corner of Lot Ten (10) Block "D"; thence Northwesterly along the Easterly line of Lot Ten (10), produced North One thousand ninety-four (1,094) feet to the Harbor Line; thence Southwesterly Seven hundred sixty (760) feet; thence South-easterly fifty (50) feet; thence southwesterly one hundred thirty-nine feet and five-tenths (139.5) feet; thence Southeasterly Four hun-

dred sixty-seven and five-tenths (467.5) feet to the beginning, containing twenty-five and thirty-one hundredths (25.31) acres, in Section Thirty-two (32), Township Fifty (50), Range Thirty-three (33).

Also beginning at the southwest corner of Lot One (1), Block "F" Old Town Reservation; thence Northwesterly along the East line of Harrison Street One hundred twenty (120) feet; thence Southwesterly twenty-five (25) feet to the center line of Harrison Street produced north; thence North along said center line produced North to the Harbor Line; thence Northeasterly along the Harbor Line to the East line of Section Thirty-two (32), Township Fifty (50) Range Thirty-three (33); thence South along said East line to intersection with the North line of Block "G" Old Town Reservation, produced northeasterly; thence Southwesterly to the Northeast corner of said Block "G"; thence One hundred twenty (120) feet; thence Southwesterly to the Southwest corner of Lot One (1), Block "G"; thence Northwesterly One hundred twenty (120) feet; thence Southwesterly Fifty (50) feet; thence Southeasterly One hundred twenty (120) feet to the Southeast corner of Lot Twelve (12) Block "F" Old Town Reservation; thence Southwesterly along the South line of said Block to the place of beginning, excepting that part of Lots Nineteen (19) to Twenty-eight (28) inclusive, Block "G" Old Town Reservation, in the right of way of the Kansas City Suburban Belt Railway, containing thirty-eight and sixty-seven hundredths (38.67) acres, in Section Thirty-two (32), Township Fifty (50) Range Thirty-three (33).

That said lots, tracts and parcels of land are and constitute a part of the following described tract of land mentioned and described in the assessment roll of benefits in the verdict of the jury, to-wit:

182 "To pay the balance of the compensation allowed for private property taken and damaged as ascertained in a prior proceeding under said Ordinance 3209 we assess. * * * We do assess against those several lots, tracts or parcels of private property within the benefit district prescribed by Ordinance 3209 * * * as follows, to wit:"

Against all that part of the northeast quarter (N. E. ¼) of the northeast quarter (N. E. ¼) of Section thirty-two (32), Township fifty (50), Range thirty-three (33), which lies south of the line two hundred (200) feet south of and parallel to the United States Harbor Line of 1904, $162.36,

Against all that part of the southeast quarter (S. E. ¼) of the northeast quarter (N. E. ¼) of Section thirty-two (32), Township fifty (50), Range thirty-three (33), which lies north of Old Town Reservation and south of a line two hundred (200) feet south of and parallel to the south line of the United States Harbor Line of 1904, $3,130.38,

Against all that part of the southwest quarter (S. W. ¼) of the northeast quarter (N. E. ¼) of Section thirty-two (32), Township fifty (50), Range thirty-three (33), which lies south of a line drawn two hundred (200) feet south of and parallel to the south line of

the United States Harbor Line of 1904, excepting also Holmes, Charlotte and Campbell Streets, $1,524.20.

1. That the proceedings had and taken herein are irregular and void.

2. Because its said lands were not legally subject to assessment of benefits for the purpose of paying the just compensation for the land taken and damaged.

3. The matters and things herein undertaken to be determined, ascertained and adjudicated have heretofore been adjudicated in the main case to which these proceedings are supplemental.

4. The facts at issue herein have heretofore been tried by a jury and cannot be otherwise re-examined in this or any other court, than according to the rules of the common law.

5. Because it has heretofore been ascertained by the verdict of the jury that the lands in question were not benefited by the improvement proposed to be made by these proceedings. Judgment has been rendered thereon and said judgment has long since become final.

6. Because its said lands are not embraced or included in any of the classes of land mentioned and described in Ordinance No. 7539, approved February 8th, 1911.

7. That no assessment was made against said lands by reason of any error, defect or omission in the proceedings under Ordinance No. 3209, approved October 19th, 1909, or in the verdict or judgment therein.

8. That no assessment of benefits was made against said
183 lands in the original proceedings had under Ordinance No. 3209, approved October 19th, 1909, or in the verdict or judgment therein which could not have been enforced by reason of some error, defect or omission, if any, in said proceedings. Said lands were not omitted from the benefit district by reason of any such defect.

9. For the reason that there was no error, defect or omission in the verdict or judgment in the original proceedings under Ordinance No. 3209, so far as the lands of this owner were concerned or involved therein. Any error, defect or omission was not in the verdict or judgment but in the failure to acquire jurisdiction over the persons being owners of certain of the lands assessed with benefits.

10. For the reason that the assessment of benefits against the lands owned by the movant embraces and includes lands not owned by it, and that the assessments against the same are in whole and in gross.

11. For the reason that certain of the lands owned by the movant were in the original proceedings assessed with benefits which it paid in full on the — day of June, 1910, and the same with other lands owned by the movant and others are now assessed in gross in this supplemental proceeding.

12. Because the amount of benefits assessed against the property owned by the movant is excessive, and does not bear the same ratio to the balance of the total assessment as the benefit to each lot or parcel bears to the whole benefit to all the private property assessed.

13. Because said verdict is against the law; because said verdict is against the evidence; because the court erred in instructing the jury;

because the court erred in not accepting a verdict and report of the jury that it was unable to agree and opened up the case for the hearing of further testimony on the 26th day of May, 1913, after the same had been closed and without notice to the movant.

14. Because the verdict is not responsive to the law and the evidence and is in conflict with the law as declared by the instructions given by the court.

15. For the reason that the jury in the original proceeding had, under Ordinance No. 3209 aforesaid, found and ascertained that other lands in the benefit district, not including these lands, would be benefited in an amount sufficient to pay the just compensation and damages awarded by the verdict in the main case.

16. Because the jury in the original proceeding had under said Ordinance No. 3209, did not find and ascertain that lands in the benefit district would be benefited in an amount exceeding the just compensation and damages to be paid by reason of the appropriation made.

17. Because these proceedings deprives the movant of its
184 property without due process of law and denies to it the equal protection of the laws within the meaning of Section thirty, Article two of the Constitution of Missouri and of Section one, Article fourteen of the amendments of the Constitution of the United States.

(Signed) KENNETH McC. DE WESSE,
Attorney for Movant."

And afterwards, and on the same day, and within four days from the rendition of the verdict in said cause, to-wit, on Wednesday, the 2nd day of July, 1913, and at said May term, 1913, of said Circuit Court, the defendants, Edgewater Terminal Railway Company and The Missouri Pacific Railway Company, filed their motion for a new trial in said cause in the words and figures following, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City, May Term, 1913.

No. 60282.

In the Matter of Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street, Kansas City, Missouri.

Motion of Defendants Edgewater Terminal Railway Company and the Missouri Pacific Railway Company for a New Trial.

Now comes The Edgewater Terminal Railway Company, and The Missouri Pacific Railway Company, defendants in the above proceedings, and moves the court to set aside the verdict of the jury rendered herein and grant a new trial hereof for the following reasons, to-wit:

1. Because the verdict is against the evidence and the weight of the evidence.

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2. Because the verdict is against the law.

3. Because the verdict is against the law as declared in the instruction of the court.

4. Because the court erred in admitting incompetent, irrelevant and immaterial evidence offered by Kansas City against the objections and exceptions of these defendants.

5. Because the court erred in excluding competent, relevant and material evidence offered by these defendants and other defendants.

6. Because the court erred in giving each and every one of the instructions requested by Kansas City, over the objections and exceptions of these defendants.

7. Because the court erred in refusing, at the request of these defendants, to instruct the jury that under the ordinances and the evidence no assessment of benefits should be made by them against the property of this defendant.

8. Because the court erred in refusing to give at the de-
185 fendants' request, instructions numbered 1, 2, 3, and 4, and in refusing to give each of said instructions.

9. Because the court erred in refusing these defendants, and other defendants, a hearing on the whole issues of damage and benefits and in refusing to try the whole case de novo, as required by the charter of Kansas City, and in so doing deprived said defendants of their property without due process of law and denied to them the equal protection of the laws within the meaning of Section 30 of Article 2 of the Constitution of Missouri, and of Section 1 of Article 14 of Amendments to the Constitution of the United States.

10. Because the original proceedings under ordinance of said City No. 3209, approved October 19th, 1909, conducted in the municipal court were wholly void as to these defendants and their property and the judgment therein was so finally adjudged and decreed in the decree of the court rendered in cause No. 53754 of the docket of this court entitled Union Pacific Railway Company et al. vs. M. A. Flynn et al. introduced in evidence, and the supplemental proceedings undertake herein by said City under Ordinance No. 7539, approved February 8th, 1911, and said ordinance- on which same are based are illegal and void as to these defendants and their property and these proceedings are barred as to these defendants and their property by said former and final adjudication.

11. Because said original Ordinance No. 3209 is void on its face.

12. Because said supplemental ordinance is void on its face for indefiniteness, uncertainty and vagueness.

13. Because the amount awarded as damages in the proceedings in the municipal court under said Ordinance No. 3209 is exorbitant and excessive and the assessment of the same upon the property in the benefit district was and is unreasonable and oppressive.

14. Because the benefit district prescribed by said ordinance is arbitrary, unreasonable and oppressive and under the evidence said defendant's property would not be benefited to any extent by the proposed condemnation or would not be benefited to the extent of the assessment thereon made in said verdict.

15. Because said Ordinance- No. 3209 and No. 7539 are unrea-

sonable, unjust, and oppressive under all the evidence in the case and are, therefore, invalid.

16. Because the court — in resuming on May 25th, 1913, the hearing of said cause and erred at said time in admitting incompetent, irrelevant and immaterial testimony offered by said city over the objections and exceptions of these defendants and erred in overruling said defendant's objections.

17. Because the court erred at said additional hearing in
186 instructing the jury at the request of said city to omit from consideration and assessment certain property located within the benefit district which had not theretofore been assessed.

(Signed) WHITE & LYONS,
Attorneys for The Edgewater Terminal Railway Company and The Missouri Pacific Railway Company."

And afterwards, and on the same day, and within four days from the rendition of the verdict in said cause, to-wit, on Wednesday the 2nd day of July, 1913, and at said May term, 1913, of said Circuit Court, the defendant, Federal Investment Company, filed its motion for a new trial in said cause in the words and figures following, to-wit:

"In the Circuit Court of Jackson County, at Kansas City, Missouri, May Term, 1913, Division No. 3.

No. 60282.

In the Matter of Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street.

Motion of Defendant Federal Investment Company for a New Trial.

Now comes the Federal Investment Company, defendant in the above proceedings, and moves the court to set aside the verdict of the jury rendered herein and grant a new trial hereof for the following reasons, to-wit:

1. Because the verdict is against the evidence and the weight of the evidence.
2. Because the verdict is against the law.
3. Because the verdict is against the law as declared in the instructions of the court.
4. Because the court erred in admitting incompetent, irrelevant and immaterial evidence offered by Kansas City against the objections and exceptions of this defendant.
5. Because the court erred in excluding competent, relevant and material evidence offered by this defendant and other defendants.
6. Because the court erred in giving over the objections and exceptions of this defendant instructions requested by Kansas City numbered — and in giving each of said instructions.

7. Because the court erred in refusing, at the request of this defendant, to instruct the jury that under the ordinances and the evidence no assessment of benefits should be made by them against the property of this defendant.

8. Because the court erred in refusing to give at this defendant's request, instructions numbered 1, 2, 3 and 4, and in refusing to give each of said instructions.

9. Because the court erred in refusing this defendant and
187 other defendants a hearing on the whole issues of damages and benefits and in refusing to try the whole case de novo, as required by the charter of Kansas City, and in so doing deprived said defendants of their property without due process of law and denied to them the equal protection of the laws within the meaning of Section 30 of Article 2 of the Constitution of Missouri and of Section 1 of Article 14 of Amendments to the Constitution of the United States.

10. Because the original proceedings under Ordinance of said city No. 3209, approved October 19th, 1909, conducted in the municipal court were wholly void as to this defendant and its property and the judgment therein was so finally adjudged and decreed in the decree of the court rendered in cause No. 53754 of the docket of this court entitled Union Pacific Railway Company et al. v. M. A. Flynn et al., introduced in evidence, and the supplemental proceedings undertaken herein by said city under Ordinance No. 7539, approved February 8th, 1911, and said ordinance on which same are based are illegal and void as to this defendant and its property and these proceedings are barred as to this defendant and its property by said former and final adjudication.

11. Because said original Ordinance No. 3209 is void on its face.

12. Because said supplemental ordinance is void on its face for indefiniteness, uncertainty and vagueness.

13. Because the amount awarded as damages in the proceedings in the municipal court under said Ordinance No. 3209 is exorbitant and excessive and the assessment of the same upon the property in the benefit district was and is unreasonable and oppressive.

14. Because the benefit district prescribed by said ordinance is arbitrary, unreasonable and oppressive and under the evidence said defendant's property would not be benefited to any extent by the proposed condemnation or would not be benefited to the extent of the assessment thereon made in said verdict.

15. Because said Ordinances No. 3209 and No. 7539 are unreasonable, unjust and oppressive under all the evidence in the case, and are, therefore, invalid.

16. Because the court erred in resuming on May 26th, 1913, the hearing of said cause and erred at said time in admitting incompetent, irrelevant and immaterial testimony offered by said city over the objections and exceptions of this defendant and erred in overruling said defendant's objections.

17. Because the court erred at said additional hearing in instructing the jury at the request of said city to omit from con-

sideration and assessment certain property located within the benefit district which had not theretofore been assessed.

(Signed) BALL & RYLAND,
Attorneys for Defendant, Federal Investment Company.

188 And afterwards, and on the same day, and within four days from the rendition of the verdict in said cause, to-wit, on Wednesday, the 2nd day of July, 1913, and at the said May term, 1913, of said Circuit Court, the defendant, State Line Improvement Company, filed its motion for a new trial and its motion in arrest of judgment in said cause, in the words and figures following, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 60282.

In the Matter of Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street.

Motion of State Line Improvement Company for New Trial.

Now comes State Line Improvement Company, one of the defendants in the above entitled cause, whose property has been assessed with benefits herein, and moves the court to set aside the verdict in the above entitled cause and grant it a new trial for the following reasons, to-wit:

1. The verdict in said cause is against the evidence and against the weight of the evidence.
2. The verdict is against the law under the evidence.
3. The court erred in refusing to dismiss this proceeding on motion of this defendant before any testimony was taken.
4. The court erred in admitting over the objection and exception of this defendant incompetent, irrelevant and immaterial evidence offered by Kansas City and by other defendants.
5. The court erred in rejecting competent, relevant and material evidence offered by the defendant.
6. The court erred in overruling this defendant's demurrer to the evidence at the conclusion of the evidence of Kansas City.
7. The court erred in refusing to instruct the jury to assess no benefits against this defendant.
8. The court erred in giving each instruction which it gave to the jury at the request of Kansas City.
9. The court erred in giving each instruction which it gave at the request of the other defendants.
10. The court erred in refusing each instruction which it refused and which was asked by this defendant.
11. The court erred in modifying each instruction asked by this defendant which is modified, and in giving such instructions as modified.

12. The court erred in giving each instruction which it gave to the jury of its own motion.

13. Because this defendant was not served with process or given legal notice either in the original proceeding under Ordinance 3209 or in the so-called supplemental proceeding under Ordinance 7539, all of which is in violation of the Charter of Kansas City.

189 14. Because Ordinance No. 7539 is illegal, unreasonable, and on its face void.

15. Because the benefit district in this proceeding is unreasonable, unjust and oppressive.

16. Because the damages exceed the benefits to the city at large and to the property in the benefit district.

17. Because the damages fixed by the jury in the original proceeding are unreasonable and excessive.

18. Because the matters herein are res adjudicata.

19. In failing to serve this defendant with process and to give it legal notice in the original proceeding and in supplemental proceeding and in denying this defendant an opportunity to appear in said original proceeding, this defendant is deprived of its property without due process of law, all of which is in conflict with Section 30 of Article 2 of the Constitution of Missouri, and of Section 1, Article 14, of the Amendments of the Constitution of the United States.

(Signed) COWHERD, INGRAHAM, DURHAM & MORSE,

Attorneys for Defendant State Line Improvement Company."

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 60282.

In the Matter of Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street.

Motion of State Line Improvement Company in Arrest of Judgment.

Now comes State Line Improvement Company, one of the defendants in the above entitled cause whose property has been assessed with benefits herein and moves the court to arrest the judgment in the above entitled cause for the following reasons:

1. Because Ordinance No. 7539, on which this proceeding is based, is illegal and unreasonable and on its face void.

2. Because the matters in controversy in this cause are res adjudicata.

3. Because the whole proceeding is void and the court has no jurisdiction thereof.

4. Because on the whole record this proceeding and this verdict are erroneous, illegal and contrary to law, and should be dismissed.

(Signed) COWHERD, INGRAHAM, DURHAM & MORSE,

Attorneys for Defendant State Line Improvement Company."

And afterwards, and on the same day, and within four days from the rendition of the verdict in said cause, to-wit, on Wednesday, the 2nd day of July, 1913, and at the said May term, 1913, of
190 said Circuit Court, the defendant, Kansas City Stock Yards Company of Missouri, filed its motion for a new trial and its motion in arrest of judgment in said cause, in the words and figures following, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 60282.

In the Matter of Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street.

Motion of The Kansas City Stock Yards Company of Missouri for New Trial.

Now comes the Kansas City Stock Yards Company of Missouri, one of the defendants in the above entitled cause, whose property has been assessed with benefits herein, and moves the court to set aside the verdict in the above entitled cause and grant it a new trial for the following reasons, to-wit:

1. The verdict in said cause is against the evidence and against the weight of the evidence.

2. The verdict is against the law under the evidence.

3. The court erred in refusing to dismiss this proceeding on motion of this defendant before any testimony was taken.

4. The court erred in admitting over the objection and exception of this defendant incompetent, irrelevant and immaterial evidence offered by Kansas City and by other defendants.

5. The court erred in rejecting competent, relevant and material evidence offered by this defendant.

6. The court erred in overruling this defendant's demurrer to the evidence at the conclusion of the evidence of Kansas City.

7. The court erred in refusing to instruct the jury to assess no benefits against this defendant.

8. The court erred in giving each instruction which it gave to the jury at the request of Kansas City.

9. The court erred in giving each instruction which it gave at the request of the other defendants.

10. The court erred in refusing each instruction which it refused and which was asked by this defendant.

11. The court erred in modifying each instruction asked by this defendant which it modified, and in giving each instruction as modified.

12. The court erred in giving each instruction which it gave to the jury of its own motion.

13. Because this defendant was not served with process or given legal notice either in the original proceeding under Ordinance 3209

or in the so-called supplemental proceeding under Ordinance 7539, all of which is in violation of the Charter of Kansas City.

14. Because Ordinance No. 7539 is illegal, unreasonable and on its face void.

191 15. Because the benefit district in this proceeding is unreasonable, unjust and oppressive.

16. Because the damages exceeded the benefits to the City at large and to the property in the benefit district.

17. Because the damages fixed by the jury in the original proceeding are unreasonable and excessive.

18. Because the matters herein are res adjudicata.

19. In failing to serve this defendant with process and to give it legal notice in the original proceeding and in the supplemental proceeding and in denying this defendant an opportunity to appear in said original proceeding, this defendant is deprived of its property without due process of law, all of which is in conflict with Section 30 of Article 2 of the Constitution of Missouri, and of Section 1 of Article 14 of Amendments to the Constitution of the United States.

(Signed) COWHERD, INGRAHAM, DURHAM & MORSE,
Attorneys for Defendant Kansas City Stock Yards Company of Missouri."

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 60282.

In the Matter of Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street.

Motion of Kansas City Stock Yards Company of Missouri in Arrest of Judgment.

Now comes the Kansas City Stock Yards Company of Missouri, one of the defendants in the above entitled cause, whose property has been assessed with benefits herein and moves the court to arrest the judgment in the above entitled cause for the following reasons:

1. Because Ordinance No. 7539, on which this proceeding is based, is illegal and unreasonable and on its face void.

2. Because the matters in controversy in this cause are res adjudicata.

3. Because the whole proceeding is void and the court has no jurisdiction thereof.

4. Because on the whole record this proceeding and this verdict are erroneous, illegal and contrary to law, and should be dismissed.

(Signed) COWHERD, INGRAHAM, DURHAM & MORSE,
Attorneys for Defendant Kansas City Stock Yards Company of Missouri."

192 And afterwards, and on the same day, and within four days from the rendition of the verdict in said cause, to-wit: On Wednesday, the 2nd day of July, 1913, and at said May Term, 1913, of said Circuit Court, the defendant St. Louis & San Francisco Railroad Company filed its Motion for a New Trial and its Motion in Arrest of Judgment in said cause in words and figures following, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 60282.

In the Matter of Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street.

Motion of St. Louis & San Francisco R. R. Co. for New Trial.

Now comes St. Louis & San Francisco Railroad Company, one of the defendants in the above entitled cause, whose property has been assessed with benefits herein, and moves the court to set aside the verdict in the above entitled cause and grant it a new trial for the following reasons, to-wit:

1. The verdict in said cause is against the evidence and against the weight of the evidence.
2. The verdict is against the law under the evidence.
3. The court erred in refusing to dismiss this proceeding on motion of this defendant before any testimony was taken.
4. The court erred in admitting over the objection and exception of this defendant incompetent, irrelevant and immaterial evidence offered by Kansas City and by other defendants.
5. The court erred in rejecting competent, relevant and material evidence offered by this defendant.
6. The court erred in overruling this defendant's demurrer to the evidence at the conclusion of the evidence of Kansas City.
7. The court erred in refusing to instruct the jury to assess no benefits against this defendant.
8. The court erred in giving each instruction which it gave to the jury at the request of Kansas City.
9. The court erred in giving each instruction which it gave at the request of the other defendants.
10. The court erred in refusing each instruction which it refused and which was asked by this defendant.
11. The court erred in modifying each instruction asked by this defendant which it modified, and in giving such instructions as modified.
12. The court erred in giving each instruction which it gave to the jury of its own motion.
13. Because this defendant was not served with process or given legal notice either in the original proceeding under Ordinance 3209 or in the so-called supplemental proceeding under Ordinance 7539, all of which is in violation of the Charter of Kansas City.

193 14. Because Ordinance No. 7539 is illegal, unreasonable, and on its face void.

15. Because the benefit district in this proceeding is unreasonable, unjust and oppressive.

16. Because the damages exceed the benefits to the City at large and to the property in the benefit district.

17. Because the damages fixed by the jury in the original proceedings are unreasonable and excessive.

18. Because the matters herein are res adjudicata.

19. In failing to serve this defendant with process and to give it legal notice in the original proceeding and in the supplemental proceeding and in denying this defendant an opportunity to appear in said original proceeding, this defendant is deprived of its property without due process of law, all of which is in conflict with Section 30 of Article 2 of the Constitution of Missouri, and of Section 1, Article 14, of the Amendments to the Constitution of the United States.

W. F. EVANS,
COWHERD, INGRAHAM, DURHAM & MORSE,
Attorneys for Defendant St. Louis & San Francisco R. R. Co."

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 60282.

In the Matter of Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street.

Motion of St. Louis & San Francisco R. R. Co. in Arrest of Judgment.

Now comes St. Louis & San Francisco R. R. Company, one of the defendants in the above entitled cause, whose property has been assessed with benefits herein and moves the court to arrest th- judgment in the above entitled cause for the following reasons:

1. Because Ordinance No. 7539, on which this proceeding is based, is illegal and unreasonable and on its face void.

2. Because the matters in controversy in this cause are res adjudicata.

3. Because the whole proceeding is void and the court has no jurisdiction thereof.

4. Because on the whole record this proceeding and this verdict are erroneous, illegal and contrary to law, and should be dismissed.

W. F. EVANS,
COWHERD, INGRAHAM, DURHAM & MORSE,
Attorneys for Defendant St. Louis & San Francisco R. R. Co."

194 And afterwards, and on the same day, and within four days from the rendition of the verdict in said cause, to-wit, on Wednesday, the 2nd day of July, 1913, and at the same May term, 1913, of said Circuit Court, the defendants, Kansas City, St. Louis & Chicago Railroad Company and The Chicago & Alton Railroad Company filed their motion for a new trial in said cause in the words and figures following, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City, May Term, 1913.

No. 60282.

In the Matter of the Supplemental Proceedings to Open and Widen Sixth Street from the East Line of Bluff Street to the West line of Broadway under Ordinance of Kansas City, Missouri, No. 7539.

Motion of Kansas City, St. Louis & Chicago Railroad Company and The Chicago & Alton Railroad Company for a New Trial.

Come now the defendants Kansas City, St. Louis & Chicago Railroad Company and The Chicago & Alton Railroad Company, whose property has been assessed with benefits in the above entitled proceeding, and jointly and severally move the court to set aside the verdict rendered herein, and to grant these defendants a new trial for the following reasons:

1. The court erred in overruling the motions made for and on behalf of these defendants, and each of them, to dismiss said proceedings, before the empanelling of the jury herein.

2. The court erred in overruling the objections interposed by and on behalf of these defendants, and each of them, to the empanelling of a jury in said cause, which objections were made prior to the empanelling of the jury herein.

3. The court erred in overruling the objections interposed by and on behalf of these defendants, and each of them, to the introduction of any testimony herein, interposed by these defendants, and each of them, at the beginning of the trial of said cause.

4. The court erred in overruling the motion to dismiss said proceedings made by and on behalf of these defendants, and each of them, at the beginning of the trial of said cause.

5. Because the court erred in admitting over the objections of these defendants, and each of them, incompetent, irrelevant and immaterial testimony offered by Kansas City and various property owners.

6. Because the court erred in excluding competent, relevant and material evidence offered by these defendants and each of them.

7. The court erred in refusing to dismiss said proceedings at the close of the trial and before the cause was submitted to the jury.

195 8. The court erred in refusing to give the instructions and each of them, asked by these defendants, and each of them, and refused by the court.

9. The court erred in giving the instructions, and each of them, asked by Kansas City, and given by the court.

10. The court erred in giving the instructions, and each of them, asked by other persons having an interest in said proceedings, and given by the court.

11. The verdict is against the evidence and against the weight of the evidence.

12. The verdict is against the law under the evidence.

13. The amount assessed by the jury against the property of these defendants, and each of them, is excessive and exorbitant and amounts to the taking of the property of these defendants without due process of law.

14. The verdict is unreasonable and the result of bias, passion and prejudice on the part of the jury.

15. The verdict as to these defendants constitutes a taking of their property without due process of law in violation of Section 30 of Article two of the Constitution of Missouri, and in violation of the fifth and fourteenth amendments to the Constitution of the United States.

16. The said Ordinance No. 7539, pursuant to which this proceeding was instituted is void and contrary to the provisions of the Charter of Kansas City.

17. These defendants have never been served with process in the original proceeding herein under Ordinance No. 3209, as required by the City Charter of Kansas City, and therefore the supplemental proceedings under said Ordinance 7539 are void as to them, and each of them.

18. The court erred in refusing to hold as a matter of law that the benefit district provided for in the ordinance under and by virtue of which these proceedings were had, namely Ordinance 7539, was, and is unreasonable, unjust and oppressive.

19. Because neither of these defendants had had its day in court or any opportunity to be heard in the trial of the proceedings, assessment of damages sustained by reason of the widening of Sixth Street described in said Ordinance 7539, and therefore each of said defendants has been and will be deprived of its property without due process of law in violation of Section 30 of Article Two of the Constitution of the State of Missouri, and in violation of the fifth and fourteenth amendments to the Constitution of the United States.

20. Under the evidence, the damages exceed the benefits.

21. There was no evidence of any benefits to the property
196 of these defendants, and the verdict as to such property is not supported by the evidence.

22. The charter provisions under which this supplemental proceeding is had are unconstitutional and void in that they deprive said defendants, and each of them, of their property without due process of law in violation of Section 30 of Article two of the Consti-

tution of the State of Missouri, and in violation of the fifth and fourteenth amendments to the Constitution of the United States.

SCARRITT, SCARRITT, JONES & MILLER,

Attorneys for Defendants, Kansas City, St. Louis & Chicago Railroad Company and The Chicago & Alton Railroad Company."

Saturday, September 6th, 1913, 9:30 A. M.

On Saturday the 6th day of September, 1913, at 9:30 o'clock A. M., and at the said May term, 1913, of said Circuit Court, the court ordered and directed, and there was made and entered of record in said cause an order setting down for hearing all motions heretofore filed in said cause for Saturday, the 13th day of September, 1913, at 9:30 o'clock A. M.

Saturday, September 13th, 1913, 9:30 A. M.

On Saturday, the 13th day of September, 1913, at 9:30 o'clock A. M., and at the September term, 1913, at said Circuit Court, the hearing of this cause was resumed and the following further proceedings had, to-wit:

(After discussion between court and counsel.)

Mr. Small: Well, we tender an offer of this whole business.

The Court: First offer what they make no objection to.

First make an offer of the part that they make no objection to, and then offer it all.

Mr. Small: Well, we offer it all.

Mr. Lee: Why don't you make a statement of who the claims of the different owners are, and let us make our objection to that?

The Court: First, can't you agree with the city counselor's office as to what portion of that land your clients own, and what
197 portion of Mr. De Weese's client owns, and then you can object to the whole verdict, and that will clear the record?

Mr. Small: It is all specified here. You have to read the whole thing. I want it in there for the purpose of proving up my allegation that we own that land.

The Court: You get the benefit of that. First, let that go in, and then you get the benefit of that verdict.

Mr. Small: I want to show that the City was a party, and the whole thing. I offer this much of this final decree in these cases decided by the District Court of the United States on November 9th, 1912, in the case of Louis F. Swift et al., Complainants, against the Union Depot Bridge & Terminal Railroad Company et al., Defendants, No. 2793, In Equity. It is admitted that this decree was entered in all of those cases.

Mr. Lee: We object to the offer of any further testimony at this time, Your Honor.

Mr. Small: We offer that to prove up our allegation.

The Court: You offer it in support of your motion?

Mr. Small: Yes, sir, that we are the owners of that land.

Mr. Lee: The City objects to the introduction of any testimony at this time, of any sort, and we further object for the reason that this decree does not tend to prove any of the allegations set forth in the motion for a new trial, and does not tend to sustain or deny any of the contentions raised by the motion for a new trial, and for the further reason that that is a matter in the decree which is irrelevant and immaterial to the issues in this case, and it tends to raise no issues not brought out at the trial of the case.

The Court: The objection will be overruled.

Mr. Small: Well, then, we will just consider that in evidence.

(Said decree was marked Exhibit "1," for identification.)

Mr. De Weese: Now, that is offered——

Mr. Small (interrupting): That is offered on behalf of the Porter S. Marquis heirs and the Kansas City Missouri Gas Company, and also on behalf of The Union Depot Bridge & Terminal Railroad Company.

The Court: Very well.

Said decree so offered in evidence, marked Exhibit "1-B," is in the words and figures following, to-wit:

198 EXHIBIT "1-B".

"In the District Court of the United States for the Western Division of the Western District of Missouri.

No. 2793. In Equity.

LOUIS F. SWIFT et al.
vs.
UNION DEPOT BRIDGE AND TERMINAL RAILROAD COMPANY et al.

No. 2794. In Equity.

LOUIS F. SWIFT et al.
vs.
UNION DEPOT BRIDGE AND TERMINAL RAILROAD COMPANY et al.

No. 2898. In Equity.

COUNTY OF JACKSON
vs.
LOUIS F. SWIFT et al.

No. 2899. In Equity.

COUNTY OF JACKSON
vs.
LOUIS F. SWIFT et al.

No. 3029. In Equity.

LOUIS F. SWIFT et al.
vs.
KANSAS CITY, MISSOURI.

No. 3071. In Equity.

MARTHA E. MCGEE
vs.
LOUIS F. SWIFT et al.

No. 3106. In Equity.

FREDERICK W. FRATT, Receiver, et al.
vs.
UNION DEPOT BRIDGE AND TERMINAL RAILROAD COMPANY et al.

No. 3107. In Equity.

FREDERICK W. FRATT, Receiver, et al.
vs.
UNION DEPOT BRIDGE AND TERMINAL RAILROAD COMPANY et al.

No. 3650. In Equity.

KANSAS CITY
vs.
LOUIS F. SWIFT et al.

No. 3561. In Equity.

KANSAS CITY
vs.
LOUIS F. SWIFT et al.

Amendment to Final Decree.

This cause coming on for hearing this eighth day of July, A. D. 1913, upon the petition of J. Ogden Armour, Louis F. Swift,
199 Union Depot Bridge and Terminal Railroad Company, the Guinotte Land Company, Frederick W. Fratt, Receiver of each of said companies, and the Parkside Land Company, complainants in one or more of the above entitled causes, and the Kansas City, Missouri, Gas Company, Mary A. Marquis, Widow, and Charles A. Marquis, Porter S. Marquis, Jr., John Bentley Marquis, and Elizabeth Musick, the children, and sole heirs and devisees of Porter S. Marquis, deceased, said Kansas City, Missouri, Gas Company and said Porter S. Marquis being defendants in one or more of said causes, and present their petition to the court, showing that since the entry of the decree herein on the 9th day of November, 1912,

the said Porter S. Marquis has departed this life, leaving the said Mary A. Marquis, his widow, and the said Charles A. Marquis, Porter S. Marquis, Jr., John Bentley Marquis and Elizabeth Musick, his children, as his sole heirs and devisees; and further showing to the court that all controversies between them and the other parties in the above entitled causes referred to in the decree rendered in the above consolidated causes on the 9th day of November, 1912, have been settled and that the conveyances to be made by Frederick W. Fratt, Receiver and Commissioner, to said Porter S. Marquis and the Kansas City, Missouri, Gas Company, respectively, are ready to be made as in said decree required, the conveyance therein ordered to be made to said Porter S. Marquis, however, on account of his death should be made to his widow and children aforesaid, if the court should so order, as it now does.

And in pursuance of said petition and the agreement of the parties, the court amends the said decree of November 9, 1912, by adding thereto the following provisions:

That when the Gilliss Street sewer, mentioned in the contract with the City of Kansas City contained in said decree, has been completed and paid for by said Union Depot Bridge and Terminal Railroad Company, the said Kansas City, Missouri, Gas Company shall pay to said Union Depot Bridge and Terminal Railroad Company, its successors or assigns, eight and nine-tenths (8.9) per cent of the actual cost thereof, which shall be a lien and charge on the property conveyed to said Kansas City, Missouri, Gas Company by said Frederick W. Fratt, Receiver and Commissioner, to-wit, so much of Parcel One (1) described in said decree of November 9, 1912, as is bounded on the south by the north line of Front Street; on the east by the center line of Harrison Street extended to the Missouri River; on the west by the east line of Lot 2, Block E, of Old Town Reserve and said east line extended to the Missouri River; and on the north by the Missouri River. The making of the Missouri River the north boundary of said tract of land shall not in any wise impair or lessen the effect of the title vested in Kansas City by said decree of November 9th, 1912. And the said widow and children of said Porter S. Marquis, deceased, shall pay to said Union Depot Bridge and Terminal Railroad Company four and
200 seven-tenths (4.7) per cent of the actual cost of said Gilliss Street sewer, which shall be a lien and charge on the property so conveyed to them by said Frederick W. Fratt, Receiver and Commissioner, to-wit, so much of Parcel One (1), described in said decree of November 9, 1912, as is bounded on the south by the north line of Front Street; on the west by the west line of Lot 11, Block D of Old Town Reserve, and said west line extended to the Missouri River; on the east by the east line of Lot 2, in Block E thereof, and said east line extended to the Missouri River; and on the north by the Missouri River. The making of the Missouri River the north boundary of said tract of land shall not in any wise impair or lessen the effect of the title vested in Kansas City by said decree of November 9th, 1912.

If the cost of said Gillis- Street sewer cannot be agreed upon,

either party in interest may apply to this court to have said cost determined by this court. And this court may enforce the liens and charges aforesaid in any proper proceeding, subjecting the respective properties to the respective sums so charged against them, but there shall be no personal obligation or liability, either upon said Kansas City, Missouri, Gas Company, or upon said widow and children of the said Porter S. Marquis, deceased, on account of the cost of said sewer, but simply a charge, as herein provided, against their said land, whoever may be the owner thereof when said Gilliss Street sewer is completed. And if at that time their said property is subdivided and a portion or portions thereof owned by other persons, the land of each owner shall be charged according to the area of his property in proportion to the area of the whole property charged.

Except as herein provided, no charge is to be made against said Kansas City, Missouri, Gas Company, or the said widow and children of said Porter S. Marquis, deceased, or their said property, on account of sewers mentioned in said decree of November 9th, 1912.

(Signed) ARBA S. VAN VALKENBURGH, *Judge.*

Dated Kansas City, Mo., July 8th, 1913."

Endorsed on the back or outside cover thereof is the following: "Amendment to Final Decree. Filed July 10th, 1913."

Here the defendants rested their case.

Here Kansas City, Missouri, rested its case.

And the foregoing was all the evidence offered and introduced on the trial of this cause.

201 The Court: Now, let the jury come in and correct the verdict as to those three tracts.

Mr. Lee: I would like to ask you Mr. Small, what the purpose of introducing this decree is, further than those three tracts which you say can be corrected from the plat?

Mr. Small: We want to prove up our case.

The Court: Well, let the jury come in next Saturday, or sooner, if you will, and correct the verdict as to those three tracts.

(After discussion between court and counsel.)

The Court: Well, let the jury come in next Tuesday morning at 9:30, and receive additional instructions as to their verdict.

Here the court adjourned the further hearing of this cause until Tuesday, the 16th day of September, 1913, at 9:30 o'clock A. M.

TUESDAY, September 16th, 1913—9:30 a. m.

On Tuesday, the 16th day of September, 1913, at 9:30 o'clock A. M., and at the said September term, 1913, of said Circuit Court the hearing of this cause was resumed, the jury in said cause being present, and the following further proceedings had, to-wit:

Mr. Petherbridge: Respecting the correction of the verdict as to

The Kansas City Missouri Gas Company and The Union Depot Bridge and Terminal Railroad Company. There is an instruction that covers that point.

(Instruction handed to and examined by court.)

The Court: This is asked by the City?

Mr. Petherbridge: Yes, sir.

The Court: Have you gentlemen any instructions to ask?

Mr. De Weese: I have one (handing instruction to court.)

Mr. Small: I have one, too. It is the same as Mr. De Weese's.

The Court: Well, go ahead.

Mr. Small: It is a different description.

The Court: We will treat it as having been filed and refused.

Thereupon Kansas City, Missouri, asked the court to instruct the jury, and requested the court to give the following additional instruction:

"1."

"GENTLEMEN OF THE JURY: It appears from the verdict filed herein, you have, by an error, assessed the lands of the Kansas City, Missouri, Gas Company, Union Depot Bridge & Terminal Railroad Company, and the Marquis heirs, with benefits jointly; you are therefore instructed to correct your verdict in that respect and assess the land of each of these parties, separately, and in the pro-
202 portion and under the rule heretofore announced and given you in the original instruction in these proceedings for the assessment of benefits. This also applied to Block 2 of Hubbard Addition, in which the title stands in the names of the Connecticut Mutual Life Insurance Co. Hiram E. Silverstone and —— Kelley which you will also separate as to the amount of benefits each tract should bear."

("Given.")

Which instruction numbered "1" the court gave over the objections of all the defendants, severally; and to which ruling and action of the court in giving said instruction so numbered all the defendants, severally, by their counsel then and there duly excepted and still except.

And thereupon the defendant, Union Depot Bridge & Terminal Railroad Company, asked the court to instruct the jury, and requested the court to give the following instructions.

"1."

"The jury are instructed that the Union Depot Bridge & Terminal Railroad Company is the owner of the following described lots and parcels of land lying within the benefit district, as the same is defined by Ordinance 3209, approved on the 19th day of October, 1909, to-wit:

"Beginning on the North line of Front Street at the Southwest corner of Lot One (1), Block "A" Old Town Reservation; thence Northeasterly along the North line of Front Street Nine hundred

fifty (950) feet to the Southeast corner of Lot Ten (10), Block "B" Old Town Reservation; thence Northwesterly One hundred twenty (120) feet; thence Northeasterly Fifty (50) feet; thence Southeasterly One hundred twenty (120) feet to the Southwest corner of Lot One (1), Block "C"; thence Northeasterly Three hundred (300) feet to the Southeast corner of Lot One (1), Block "C"; thence Northwest One hundred twenty (120) feet; thence Northeast Fifty (50) feet; thence Southeasterly One hundred twenty (120) feet to the Southwest corner of Lot One (1), Block "D"; thence Northeasterly along the North line of Front Street Two hundred fifty (250) feet to the Southeast corner of Lot Ten (10) Block "D"; thence Northwesterly along the Easterly line of Lot Ten (10), produced North One thousand ninety-four (1094) feet to the Harbor Line; thence Southwesterly Seven hundred sixty (760) feet; thence Southeasterly Fifty (50) feet; thence Southwesterly One hundred thirty-nine and five tenths (139.5) feet; thence Southeasterly Four hundred sixty-seven and five tenths (467.5) feet to the beginning, containing Twenty-five and thirty-one hundredths (25.31) acres, in Section Thirty-two (32), Township Fifty (50), Range Thirty-three (33), except the North 100 feet thereof.

203 Also beginning at the Southwest corner of Lot One (1), Block "F" Old Town Reservation; thence Northwesterly along the East line of Harrison Street One hundred twenty (120) feet; thence Southwesterly Twenty-five (25) feet to the center line of Harrison Street produced North; thence North along said center line produced North to the Harbor Line; thence Northeasterly along the Harbor Line to the East line of Section Thirty-two (32), Township Fifty (50), Range Thirty-three (33); thence South along said East line to intersection with the North line of Block "G" Old Town Reservation, produced Northeasterly; thence Southwesterly to the Northeast corner of said Block "G"; thence One hundred twenty (120) feet; thence Southwesterly to the Southwest corner of Lot (1), Block "G"; thence Northwesterly One hundred twenty (120) feet; thence Southwesterly Fifty (50) feet; thence Southeasterly One hundred twenty (120) feet to the Southeast corner of Lot Twelve (12) Block "F" Old Town Reservation; thence Southwesterly along the South line of said Block to the place of beginning, excepting that part of Lots Nineteen (19) to Twenty-eight (28) inclusive, Block "G" Old Town Reservation, in the right-of-way of the Kansas City Suburban Belt Railway, containing Thirty-eight and Sixty-seven hundredths (38.67) acres, in Section Thirty-two (32), Township Fifty (50), Range Thirty three (33), except the North 100 feet thereof.

The jury are further instructed that a portion of said tracts *were* assessed with benefits by reason of the improvement proposed to be made by the jury in the original proceedings had and conducted under and by virtue of Ordinance 3209, approved on the 19th day of October, 1909, and that said Union Depot Bridge & Terminal Railroad Company paid, or caused the same to be paid, and that the remainder of said lands *were* by the jury, in the former proceedings conducted under and by virtue of said Ordinance 3209, found not

to be benefited by said proposed improvement. You will, therefore, not assess said lands so found by said verdict not to be benefited in said original proceedings with any benefits in this supplemental proceeding by reason of the fact that the jury, in the former proceedings, found said lands not to be benefited thereby, and that said Union Depot Bridge and Terminal Railroad by paying said assessment accepted said verdict."

("Refused.")

Which instruction numbered "1" the court refused to give; and to which ruling and action of the court in refusing to give said instruction so numbered the defendant, Union Depot Bridge & Terminal Railroad Company, and all of the other defendants, severally, by their counsel then and there excepted and still except.

204 And thereupon the defendants Mary A. Marquis, widow, Charles A. Marquis, Porter S. Marquis, Jr., John Bentley Marquis and Elizabeth Musick, heirs, children and devisees of Porter S. Marquis, deceased, asked the court to instruct the jury, and requested the court to give each of the following instructions:

"1."

"You are further instructed that you must assess each lot, tract, and parcel of land deemed benefited by you by reason of the proposed improvement with an amount that bears the same rates to the total balance of compensation and damages to be paid, that the particular benefits to said lot, tract or parcel of lands bears to the total benefit to all private property deemed benefited, within the benefit district as prescribed and fixed by ordinance."

("Given.")

Which instruction numbered "1" the court gave over the objections of all of the other defendants, severally; and to which ruling and action of the court in giving said instruction so numbered all of the other defendants, severally, by their counsel then and there duly excepted and still except.

And thereupon the defendant, Kansas City Missouri Gas Company, asked the court to instruct the jury, and requested the court to give each of the following instructions:

"1."

"You are further instructed that you (will) must assess each lot, tract and parcel of land deemed benefited by you by reason of the proposed improvement with an amount that bears the same rates to the total balance of compensation and damages to be paid, that the particular benefits to said lot, tract or parcel of lands bears to the total benefit to all private property deemed benefited, within the benefit district as prescribed and fixed by ordinance."

("Given.")

Which instruction numbered "1" the court gave over the objection of all of the other defendants, severally; and to which ruling and action of the court in giving said instruction so numbered all of the other defendants, severally, by their counsel then and there duly excepted and still except.

Mr. Brumback: In regard to Block 2 of Hubbard's Addition: It was originally owned by the Connecticut Mutual Life Insurance Company; and before the taking effect of the ordinance, the Insurance Company sold to Hiram E. Silverstone Lot 6 and the north 15 feet of Lot 7 in said block, and to —— Kelly, Lot
205 10 and the south 15 feet of Lot 9, the Insurance Company retaining the balance of the block itself. The titles are of record, and were before the taking effect of the ordinance.

The Court: Read your instructions to the jury, gentlemen.

(Given instructions here read to jury.)

Mr. De Weese: I want the court to let the record show an exception to the court's refusal to give my instruction.

The Court: The record will show that.

(After discussion between court and counsel.)

The Court: Let the jury return their corrected verdict on Thursday morning, at 9:30.

Here the court adjourned the further hearing of this cause until Thursday, the 18th day of September, 1913, at 9:30 o'clock A. M.

THURSDAY, September 18th, 1913—9:30 a. m.

On Thursday, the 18th day of September, 1913, at 9:30 o'clock A. M., and at said September Term, 1913, of said Circuit Court, the hearing of this cause was resumed and the following proceedings had, to-wit:

Mr. Lee: The verdict is ready, Your Honor (producing verdict). Is this your verdict, gentlemen?

The Jurors: Yes.

The Court: Let it be filed. Of course, the entire verdict is to be filed.

Mr. Lee: Gentlemen, the older part of the verdict, that you have corrected and scratched out, you desire to have that erased?

The Jurors: Yes, sir.

Said corrected verdict so returned by the jury was here filed of record in said cause, and is in the words and figures following, to-wit:

(This verdict is covered by the stipulation printed as part of the record herein.)

To which ruling and action of the court in ordering and directing that said corrected verdict be filed, and to the filing of said corrected verdict, all the defendants, severally, by their counsel then and there duly excepted.

The Court: What do you want to do with your motions for a new trial? Do you want to re-file them?

Mr. De Weese: I take it, that we have four days in which to file our motions for a new trial.

The Court: Yes, sir. But in order to save any question about

that, the record ought to show that all of the motions have been re-filed. Then, you can file any additional motions you wish.

The Court: Let the record show that all motions hereto-
206 fore filed are now of this date re-filed. Now, if you want to file additional or new motions, you can do it.

Mr. Langworthy: This is simply an order directing that their verdict be filed, Your Honor? That is, the former verdict is not set aside. There is no order for that?

The Court: There is an order for the jury to correct their verdict. There is no order setting aside the former verdict at all. This is just simply an order for the jury to correct their verdict.

Mr. De Weese: The Union Depot Bridge & Terminal Railroad Company will file its Motion in Arrest of Judgment. This is a new motion.

Said Union Depot Bridge & Terminal Railroad Company thereupon filed with the Clerk of said court its Motion in Arrest of Judgment and to Dismiss Proceedings, in said cause, in the words and figures following, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1913.

No. 60282.

In the Matter of the Supplemental Proceedings for Opening and Widening of Sixth Street from the East Line of Bluff Street to the West Line of Broadway.

Comes now the Union Depot Bridge and Terminal Railroad Company, and moves the court to arrest the judgment upon the verdict of the jury filed herein on September 18th, 1913, and to quash this proceedings and to dismiss the same for the following reasons, to-wit:

1. Because there is no valid ordinance of the Common Council of Kansas City, Missouri, authorizing the same. Said ordinance to be valid should find and recite the particular errors, defects or omissions contained in the original proceedings or in the verdict or judgment therein, by reason of which private property sought to be taken in the original proceeding could not be acquired, and should find and recite the errors, defects or omissions by reason of which an assessment made against private property could not be enforced or collected, and should find and recite the defect by reason of which any private property in the benefit district was omitted from the proceedings or verdict, and should describe the particular piece or pieces of private property sought to be acquired or assessed in the supplemental proceedings.

2. Because Ordinance No. 7539 of the Common Council approved February 18th, 1911, authorizing the institution, carrying on and maintenance of this supplemental proceeding is null and void and of no effect for the following reasons, to-wit:

(*a*) Because there were no such errors, defects or omissions in

the original proceedings conducted herein or in the ver-
207 dict or judgment therein, within the meaning of Section 23, Article VI of the Charter of Kansas City, as would authorize or empower the Common Council of said city to ordain the particular Ordinance No. 7539, approved February 18th, 1911, authorizing these proceedings to be conducted in manner and form as herein undertaken to be conducted and carried on.

(*b*) Because said ordinance is so indefinite and uncertain that it cannot be ascertained what defect, error or omission, if any, in the original proceeding, or what defect, error or omission in the verdict or judgment, if any, in the original proceedings, or what private property sought to be taken or what interest therein could not be acquired, or what assessment, if any, was made therein against private property which could not be enforced or collected, or by reason of what defect, error or omission, if any, private property in the benefit district had been omitted therefrom, as would authorize or empower the Common Council of said City to ordain said Ordinance No. 7539.

(*c*) Because supplemental proceedings are authorized by Section 23, Article VI of the Charter of said City to acquire the right and title to only such property or interest therein as was intended to be taken by the first proceeding, but which could not on account of some defect, error or omission therein, be acquired thereunder, or else to properly assess against any piece or parcel of private property only such as were erroneously assessed or omitted to be assessed.

(*d*) Because said ordinance is uncertain and indefinite in this, to-wit:

That it does not set out and specifically describe the particular pieces of private property to be acquired or assessed, against which the supplemental proceedings are to be conducted.

(*e*) Said ordinance is uncertain and indefinite in this, to-wit: That it does not find or recite what errors, defects, or omissions, if any, were in the original proceedings or in the verdict or judgment therein by reason of which any private property sought to be taken or any interest therein, could not be acquired, nor for what reason or reasons any assessment made against private property could not be enforced or collected, nor for or by reason or reasons any private property had been omitted from the benefit district.

Wherefore, defendant, Union Depot Bridge and Terminal Railroad Company prays that judgment herein be arrested; that the proceedings be quashed and dismissed, and that it have judgment herein for its costs, and that execution issue therefor.

(Signed) KENNETH McD. DE WEESE.
Attorney for Defendant Union Depot Bridge and Terminal R. R. Co."

208 Thereupon, by order and direction of the court, all the former Motions for a New Trial and Motions in Arrest of Judgment filed in said cause were marked re-filed by the Clerk of said court and re-filed in said cause, and are the identical motions hereinbefore set out in full in this bill of exceptions.

And afterwards, and within four days from the rendition of the corrected verdict in said cause, to-wit, on Saturday the 20th day of September, 1913, and at said September term, 1913, of said Circuit Court, the defendant, The Chicago, Rock Island and Pacific Railway Company, filed its motion for a new trial and its motion in arrest of judgment in said cause in the words and figures following:

"In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1913.

No. 60282.

In the Matter of Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street.

Separate Motion of the Chicago, Rock Island and Pacific Railway Company for a New Trial.

Now comes The Chicago, Rock Island and Pacific Railway Company and moves the court to set aside the verdict and grant a new trial in the above entitled cause for the following reasons, to-wit:

(1) The verdict is against the law.

(2) The verdict is against the evidence.

(3) The verdict is against the law and the evidence.

(4) The verdict is against the weight of the evidence.

(5) The verdict is so against the weight of the evidence as to show that it was arrived at through bias, prejudice, passion or sympathy.

(6) There is not sufficient evidence to warrant a verdict against this defendant.

(7) The verdict was arrived at by the jury through conjecture or speculation.

(8) The verdict against this defendant is excessive.

(9) The verdict against this defendant is so excessive as to show that it was arrived at through bias, prejudice, passion or sympathy.

(10) The court committed error in admitting incompetent, irrelevant and illegal evidence on the part of the plaintiff.

(11) The court committed error in overruling and refusing to give the demurrer offered at the request of this defendant at the close of all the evidence.

(12) The court committed error in giving the instructions, and each of them, that were given in behalf of the plaintiff.

(13) The court committed error in refusing the instruc-
209 tions, and each of them, that were modified by the court, and in giving said instructions, and each of them, as modified by the court.

(14) The court committed error in refusing the instructions, and each of them, that were modified by the court, and in giving said instructions, and each of them, a*m* modified by the court.

(15) The court committed error in giving the instructions, and each of them, that were given by the court of its own motion.

(16) The proceedings under Ordinance No. 3209 of Kansas City, Missouri, approved October 19th, 1909, are illegal and of no effect, and not binding upon this defendant.

(17) The proceedings under Ordinance No. 7539 of Kansas City, Missouri, approved February 18th, 1911, are void, illegal and of no effect as to this defendant.

(18) The publication notice in the proceedings under said Ordinance No. 3209 of Kansas City, Missouri, was defective, illegal, insufficient and did not confer any jurisdiction upon the court so far as this defendant is concerned.

(20) Said Ordinance No. 7539 is too vague, indefinite and uncertain in its terms and does not specify any particular error, defect or omissions in said original Ordinance No. 3209, which said Ordinance No. 3209, Ordinance No. 7539 was passed with a view of correcting.

(21) The benefit district prescribed in said Ordinance No. 3209 and said Ordinance No. 7539 is excessive in that it includes too much property or territory.

(22) The benefits assessed under said original Ordinance No. 3209 and under said Ordinance No. 7539 are far in excess of any possible benefit that can arise either to the city at large or to any property holder or person within the benefit district.

(23) The verdict returned by the jury is improper and of no force and effect for the reason that the jury returned their verdict at a term subsequent to the term at which the case was tried.

(24) The jury was not qualified or competent to return a verdict in this case for the reason that they were qualified as jurors to try and determine said cause at a term prior to and different from the term at which they returned their verdict.

(25) The jury were not competent, qualified nor authorized by law to amend their verdict at a term subsequent to the term at which said verdict was returned.

(26) It was incompetent, improper and unlawful for the jury to attempt to modify its verdict at a term subsequent to the matter which said verdict was rendered.

PAUL E. WALKER,
SEBREE, CONRAD & WENDORFF,
Attorneys for Defendant The Chicago, Rock Island and Pacific Railway Company.

210 "In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1913.

No. 60282.

In the Matter of the Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street.

Separate Motion of The Chicago, Rock Island and Pacific Railway Company in Arrest of Judgment.

Now comes the Chicago, Rock Island and Pacific Railway Company and moves the court to arrest the judgment in the above entitled cause for the following reasons, to-wit:

(1) Because on the record the judgment is erroneous.

(2) Because the jury were not authorized by law to return the verdict which they returned in this case.

(3) Because the jury was not authorized by law to change or modify its verdict at a term of court subsequent to the term at which said cause was tried and verdict returned.

(4) The judgment is not responsive to the issue raised by the pleadings in this cause.

PAUL E. WALKER,
SEBREE, CONRAD & WENDORFF,
Attorneys for the Chicago, Rock Island and Pacific Railway Co."

And afterwards, and within four days from the rendition of the corrected verdict in said cause, to-wit, on Monday, the 22nd day of September, 1913, and at said September term, 1913, of said Circuit Court, the defendants, St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Burlington & Quincy Railway Company, Hannibal & St. Joseph Railway Company and Kansas City, St. Joseph & Council Bluffs Railroad Company, filed their motion for a new trial in said cause in the words and figures following:

"In the Circuit Court of Jackson County, Missouri, at Kansas City, May Term, 1913.

No. 60282.

In the Matter of the Condemnation Proceedings for the Widening of Sixth Street from Broadway to Bluff Street.

Motion for New Trial on Behalf of Defendants, St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Burlington & Quincy Railway Company, Hannibal & St. Joseph Railway Company and Kansas City, St. Joseph and Council Bluffs Railroad Company.

Now comes the defendants, St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Burlington & Quincy Railway Company, Hannibal & St. Joseph Railway Company and Kansas City, St. Joseph & Council
211 Bluffs Railroad Company, and jointly and separately move the court to set aside the verdict of the jury herein, and grant them and each of them a new trial of said cause for the following reasons:

1. The court committed error in overruling the motions made by and on behalf of these defendants and each of them to dismiss said proceedings before the empaneling of the jury herein.

2. The court committed error in overruling the objections interposed by and on behalf of these defendants and each of them to the empanelling of the jury in said cause, which said objections were made prior to the empaneling of the jury herein.

3. The court committed error in overruling the objections to the introduction of any testimony herein interposed by and on behalf of these defendants and each of them at the beginning of the trial of said cause.

4. Because the court overruled the motions to dismiss said proceedings made by and on behalf of these defendants and each of them at the beginning of the trial of said cause.

5. Because the court committed error in admitting incompetent, irrelevant and immaterial evidence in said cause over the objections and exceptions made by and on behalf of these defendants and each of them.

6. Because the court committed error in the exclusion of competent, relevant and material testimony and evidence offered by and on behalf of these defendants and each of them.

7. Because the court committed error in refusing to dismiss said proceedings at the close of the trial as requested by and on behalf of these defendants and each of them.

8. Because the court committed error in refusing to give the instructions and each of the instructions requested by and on behalf of the defendants and each of them, at the close of the entire case.

9. Because the court committed error in giving to the jury the instructions which it did give on behalf of Kansas City.

10. Because the verdict is against the greater weight of the evidence.

11. Because the verdict is grossly excessive as to these defendants and each of them.

12. Because the verdict of the jury is against the law and the evidence.

13. Because the verdict of the jury is the result of bias, passion and prejudice on the part of the jury.

14. Because said verdict, if allowed to stand, will result in the taking of property belonging to these defendants and each of them, without due process of law, in violation of Section 30, of Article II, of the Constitution of the State of Missouri, and in violation of the 5th and 14th amendments to the Constitution of the United States.

212 15. Because the ordinance under and by virtue of which the above proceedings were had, is void, and in violation of and contrary to the provisions of the City Charter of Kansas City.

16. Because these defendants have never been served with process in the original proceeding herein, under Ordinance No. 3209, as required by the City Charter of Kansas City, and said proceedings are therefore void as to them and each of them.

17. Because the court committed error in refusing to hold as a matter of law that the Benefit District provided for in the Ordinance under and by virtue of which these proceedings were had, was and is unreasonable, unjust and oppressive.

18. Because these defendants and each of them have not had their day in court and have had no opportunity to be heard as to the proceedings for the assessment of damages sustained by reason of the widening of Sixth Street, and by reason thereof, have been and will be deprived of property without due process of law, in violation of Section 30 of Article II, of the Constitution of the State of Missouri, and in violation of the 5th and 14th Amendment of the Constitution of the United States.

19. Because the court committed error in overruling these defendants' objection to the introduction of any evidence under Ordinance No. 7539, authorizing supplemental proceedings, and all proceedings thereunder, for the reason that the said Ordinance and said proceedings thereunder are wholly insufficient on which to base any proceedings as appears on the face of said Ordinance, and because said Ordinance does not comply with the charter provisions of Kansas City, Missouri, and does not describe what property has been omitted from the assessment under the original proceedings, or what property was sought to be taken by said original proceedings, or what property was benefited by said original proceedings, and for which supplemental proceedings were instituted, and because the said Ordinance and proceedings thereunder do not comply with the charter provisions of Kansas City, Missouri, authorizing supplemental proceedings, and because there were no valid proceedings under Ordinance No. 3209 to supplement.

20. Because the court committed error in overruling these defendants' objection to the introduction of any evidence under said supplemental proceedings, for the reason that, under and by virtue of said proceedings, the said Kansas City deprived the defendants of their rights to a valid notice of the pendency of said proceedings under Ordinance No. 3209 as provided in Section 2 of Article 6 of the charter of Kansas City, Missouri, which requires the said city in such condemnation proceedings to give notice by publication for four consecutive weeks, which was not done in said original proceedings, and that such failure to give such notice as required by the provisions of the charter of Kansas City, Missouri, as aforesaid, deprived these defendants of their rights to appear, introduce
213 evidence, and to be heard in said proceedings as to the amount of damage to be awarded for which their property would be assessed benefits, and were thereby deprived of a hearing in said proceedings which was given by said charter provisions aforesaid, and that the ruling of the court in these supplemental proceedings deprived these defendants of their right to be heard in said original proceedings, and also in these supplemental proceedings on the question of damages sustained for which the defendants' property was and is assessed benefits and, in so ruling, this court deprived these defendants of their right to a hearing and the right to introduce testimony in said cause before said jury, in violation of Section 2 of Article 6, and Section 3 of Article 6 and Section 6 of Article 6 of the charter of Kansas City, Missouri, and deprived these defendants of their property without due process of law, and denied to them the equal protection of the law, in violation of the Constitution of the State of Missouri, and also in violation of Section 1 of Article 14, Amendments to the Constitution of the United States, and these defendants here and now invoke the protection of said constitutional provisions of the State of Missouri, and also of Section 1 of Article 14, Amendments to the Constitution of the United States as a defense to the proceedings under the supplemental ordinance herein.

21. Because the court committed error in holding that these defendants could not introduce any evidence before the jury showing the value of the property sought to be condemned under the original Ordinance No. 3209 and the proceedings thereunder, and in so ruling, this court denied these defendants the right of defense given under and by virtue of Section 3 of Article 6 of the charter of Kansas City, Missouri, which is and was a property right, and, in so denying such right to these defendants, the court deprived these defendants of their property without due process of law in violation of Section 1, Article 14, Amendments to the Constitution of the United States, and also denied to these defendants the equal protection of the law guaranteed by the said Section 1 of Article 14, Amendments to the Constitution of the United States, and these defendants here and now invoke the protection given by said Section 1 of Article 14, Amendments to the Constitution of the United States, as a defense to the verdict and judgment rendered herein.

22. Because the court committed error in holding that the pro-

ceedings under Ordinance No. 3209 were valid and binding on these defendants in these supplemental proceedings, and that such original proceedings could be supplemented by these supplemental proceedings, for the reason that, under the pleadings, evidence and decree in the case of Union Pacific Rd. Co. et al. v. M. A. Flynn et al., introduced in evidence, the court had already decreed and decided that the proceedings under Ordinance No. 3209 were null and void, and enjoined the issuance of any tax bills there-
214 under, against the property of some of the defendants herein and such decree is and was a final decree unappealed from, and is and was res adjudicata as against the said Kansas City in these supplemental proceedings and the court erred in holding that said decree did not estop the said Kansas City in such supplemental proceedings which it had already adjudged null and void, and therein the court erred against the rights of these defendants.

23. Because, under the proceedings herein and the proceedings under Ordinance No. 3209, introduced in evidence these defendants have been denied a hearing in this court as to the amount of damages to be awarded for the property sought to be taken, and the benefits assessed against the property of these defendants, and they have been deprived of their property without due process of law, and been denied the equal protection of the law, and the legal protection of rights given under the charter of Kansas City, Missouri, all in violation of Section 1 of Article 14, Amendments to the Constitution of the United States, and these defendants here and now invoke the protection of said Section 1 of Article 14, Amendments to the Constitution of the United States, as a defense to any assessment of benefits made under the proceedings herein.

24. Because the court committed error in recalling the jury for further instructions in said cause after the rendition of their original verdict herein.

25. Because the court committed error in giving to the jury further instructions after the rendition of the original verdict herein.

26. Because the court committed error in giving to the jury each and every of the instructions which it did give after the rendition of their original verdict.

27. Because the court committed error in permitting the jury to correct their verdict herein long after the rendition thereof, and after the expiration of the term during which said verdict was rendered, filed and received.

28. Because the court committed error in receiving and ordering to be filed, the so-called corrected verdict herein.

29. Because there is no public necessity for the alleged improvements attempted to be provided for under and by virtue of said proceedings.

WARNER, DEAN, McLEOD & LANGWORTHY,

Attorneys for Defendants, St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Burlington & Quincy Railway Company, Hannibal & St. Joseph Railway Company, and Kansas City, St. Joseph & Council Bluffs Railroad Company."

215 SATURDAY, October 4th, 1913, 9:30 a. m.

On Saturday, the 4th day of October, 1913, at 9:30 o'clock A. M., and at said September Term, 1913, of said Circuit Court, the court made an order in said cause setting down for hearing all Motions for a New Trial and Motions in Arrest of Judgment heretofore filed in said cause, for Saturday, October 11th, 1913, at 9:30 o'clock A. M.

SATURDAY, October 11th, 1913, 9:30 a. m.

On Saturday, the 11th day of October, 1913, at 9:30 o'clock A. M., and at said September Term, 1913, of said Circuit Court, the hearing of this cause was resumed and the following further proceedings had, to-wit:

(After arguments on Motions for a New Trial and Motions in Arrest of Judgment.)

And afterwards, and on the same day, to-wit: On Saturday, the 11th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court overruled all Motions for a New Trial heretofore filed in said cause by defendants St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Burlington & Quincy Railway Company, Hannibal & St. Joseph Railway Company and Kansas City, St. Joseph & Council Bluffs Railroad Company; and to which ruling and action of the court in overruling said Motions for a New Trial the defendants, St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railway Company, Hannibal & St. Joseph Railway Company and Kansas City, St. Joseph & Council Bluffs Railroad Company, and all the other defendants, severally, by their counsel then and there duly excepted and still except.

And afterwards, and on the same day, to-wit: On Saturday, the 11th day of October, 1913, and at said September Term, 1913 of said Circuit court the court overruled all Motions for a New Trial heretofore filed in said cause by defendant Chicago, Rock Island & Pacific Railway Company; and to which ruling and action of the court in overruling said Motions for a New Trial the defendant, Chicago, Rock Island & Pacific Railway Company, and all the other defendants, severally, by their counsel then and there duly excepted and still except.

And afterwards, and on the same day, to-wit: On Saturday, the 11th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court overruled all Motions in Arrest of Judgment heretofore filed in said cause by defendant, Chicago, Rock Island & Pacific Railway Company; and to which ruling and action of the court in overruling said Motions in Arrest of Judg-
216 ment the defendant, Chicago, Rock Island & Pacific Railway Company and all the other defendants, severally, by their counsel then and there duly excepted and still except.

And afterwards, and on the same day, to-wit: On Saturday, the 11th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court overruled all Motions for a New

Trial heretofore filed in said cause by defendants, Union Pacific Railroad Company, George S. Graham, H. G. Kaill and Felix LaForce; and to which ruling and action of the court in overruling said Motions for a New Trial the defendants, Union Pacific Railroad Company, George S. Graham, H. G. Kaill and Felix LaForce, and all the other defendants, severally, by their counsel then and there duly excepted and still except.

And afterwards, and on the same day, to-wit: On Saturday, the 11th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court overruled all Motions for a New Trial heretofore filed in said cause by defendant, Union Depot Bridge & Terminal Railroad Company; and to which ruling and action of the court in overruling said Motions for a New Trial the defendant, Union Depot Bridge & Terminal Railroad Company, and all the other defendants, severally, by their counsel then and there duly excepted and still except.

And afterwards, and on the same day, to-wit: On Saturday, the 11th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court overruled the Motion in Arrest of Judgment heretofore filed in said cause by defendant, Union Depot Bridge & Terminal Railroad Company; and to which ruling and action of the court in overruling said Motion in Arrest of Judgment the defendant, Union Depot Bridge & Terminal Railroad Company, and all the other defendants, severally, by their counsel then and there duly excepted and still except.

And afterwards, and on the same day, to-wit: On Saturday, the 11th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court overruled all Motions for a New Trial heretofore filed in said cause by defendants, Edgewater Terminal Railway Company and The Missouri Pacific Railway Company; and to which ruling and action of the court in overruling said Motions for a New Trial the defendants, Edgewater Terminal Railway Company and the Missouri Pacific Railway Company, and all the other defendants, severally, by their counsel then and there duly excepted and still except.

And afterwards, and on the same day, to-wit: On Saturday the 11th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court overruled all Motions for a
217 New Trial heretofore filed in said cause by defendant Federal Investment Company; and to which ruling and action of the court in overruling said Motions for a New Trial the defendant, Federal Investment Company, and all the other defendants, severally, by their counsel then and there duly excepted and still except.

And afterwards, and on the same day, to-wit: On Saturday, the 11th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court overruled all Motions for a New Trial heretofore filed in said cause by defendant State Line Improvement Company; and to which ruling and action of the court in overruling said Motions for a New Trial the defendant, State Line Improvement

Company, and all the other defendants, severally, by their counsel then and there duly excepted and still except.

And afterwards, and on the same day, to-wit: On Saturday, the 11th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court overruled all Motions in Arrest of Judgment heretofore filed in said cause by defendant State Line Improvement Company; and to which ruling and action of the court in overruling said Motions in Arrest of Judgment the defendant, State Line Improvement Company, and all the other defendants, severally, by their counsel then and there duly excepted and still except.

And afterwards, and on the same day, to-wit: On Saturday, the 11th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court overruled all Motions for a New Trial heretofore filed in said cause by defendant Kansas City Stock Yards Company of Missouri; and to which ruling and action of the court in overruling said Motions for a New Trial the defendant, Kansas City Stock Yards Company of Missouri, and all the other defendants, severally, by their counsel then and there duly excepted and still except.

And afterwards, and on the same day, to-wit: On Saturday, the 11th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court overruled all Motions in Arrest of Judgment heretofore filed in said cause by defendant Kansas City Stock Yards Company of Missouri; and to which ruling and action of the court in overruling said Motions in Arrest of Judgment the defendant, Kansas City Stock Yards Company of Missouri, and all the other defendants, severally, by their counsel then and there duly excepted and still except.

And afterwards, and on the same day, to-wit: On Saturday, the 11th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court overruled all Motions for a New
218 Trial heretofore filed in said cause by defendant St. Louis & San Francisco Railroad Company; and to which ruling and action of the court in overruling said Motions for a New Trial the defendant, St. Louis & San Francisco Railroad Company, and all the other defendants, severally, by their counsel then and there duly excepted and still except.

And afterwards, and on the same day, to-wit: On Saturday, the 11th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court overruled all Motions in Arrest of Judgment heretofore filed in said cause by defendant St. Louis & San Francisco Railroad Company; and to which ruling and action of the court in overruling said Motions in Arrest of Judgment the defendant, St. Louis & San Francisco Railroad Company and all the other defendants, severally, by their counsel then and there duly excepted and still except.

And afterwards, and on the same day, to-wit: On Saturday, the 11th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court overruled all Motions for a New Trial heretofore filed in said cause by defendants Kansas City, St. Louis

& Chicago Railroad Company and The Chicago & Alton Railroad Company; and to which ruling and action of the court in overruling said Motions for a New Trial the defendants, Kansas City, St. Louis & Chicago Railroad Company and The Chicago & Alton Railroad Company, and all the other defendants, severally, by their counsel then and there duly excepted and still except.

And afterwards, and on the same day, to-wit: on Saturday the 11th day of October, 1913, and at said September term, 1913, of said Circuit Court, the court made, directed and caused to be entered of record an order confirming the verdicts heretofore filed by the jury in said cause.

To which ruling and action of the court in ordering and directing the confirmation of said verdicts, and to the record entry confirming said verdicts, all of the defendants, severally, by their counsel then and there duly excepted and still except.

And afterwards, to-wit: on Monday, the 13th day of October, 1913, and at said September term, 1913, of said Circuit Court, the defendant, The Missouri Pacific Railway Company, filed its application and affidavit for appeal in said cause, in the words and figures following:

219 "In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1913.

In the Matter of the Condemnation of Property for the Widening of Sixth Street from Broadway to Bluff Street, Kansas City, Missouri.

No. 60282.

Application and Affidavit for Appeal of the Missouri Pacific Railway Company.

I, Martin Lyons, of lawful age, being duly sworn, upon oath state that I am agent and attorney for The Missouri Pacific Railway Company, in the above action, and pray for an appeal in this cause to the Supreme Court of Missouri, and I further state that such appeal is not made for vexation or delay, but because this affiant believes that said appellant is aggrieved by the judgment and decision of the above named court in said cause.

(Signed) MARTIN LYONS,
Agent and Attorney for the Missouri Pacific Railway Company.

Subscribed and sworn to before me, a notary public within and for Jackson County, Missouri, this 13th day of October, 1913.

My commission expires 9th day of August, 1917.

[Seal Mercia Jennings, Notary Public, Jackson County, Mo.]

(Signed) MARCIA JENNINGS,
Notary Public Jackson County."

And afterwards, and on the same day, to-wit: on Monday, the 13th day of October, 1913, and at said September term, 1913, of said Circuit Court, the court sustained said application and affidavit for appeal so filed in said cause by defendant, The Missouri Pacific Railway Company, and granted and allowed said defendant an appeal in said cause to the Supreme Court of the State of Missouri.

And thereupon the court fixed the appeal bond to be filed by said defendant, The Missouri Pacific Railway Company, in said cause at the sum of one thousand dollars, the same to be filed on or before ten days after final adjournment of said September term, 1913, of said Circuit Court.

And thereupon the court granted and allowed said defendant, The Missouri Pacific Railway Company, until on or before the 15th day of December, 1913, within which time to file its bill of exceptions herein.

And afterwards, to-wit: on Friday the 17th day of October, 1913, and at said September term, 1913, of said Circuit Court, the defendants, Kansas City, St. Louis & Chicago Railroad Company
220 and The Chicago & Alton Railroad Company, filed their application and affidavit for appeal in said cause in the words and figures following:

"In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1913.

No. 60282.

In the Matter of the Supplemental Proceedings to Open and Widen Sixth Street from the East Line of Bluff Street to the West Line of Broadway under Ordinance of Kansas City, Missouri, Number 7539.

Application of Kansas City, St. Louis & Chicago Railroad Company and The Chicago & Alton Railroad Company for an Appeal.

Now comes the Kansas City, St. Louis & Chicago Railroad Company and The Chicago & Alton Railroad Company, and state that they are the owners of property which has been assessed with benefits in the above entitled proceeding, and they pray the court to allow them an appeal from the judgment heretofore rendered in said proceedings.

In support of this application said petitioners present herewith and file herein an affidavit for appeal as required by law.

(Signed) SCARRITT, SCARRITT, JONES & MILLER,
Attorneys for Kansas City, St. Louis & Chicago Railroad Company and The Chicago & Alton Railroad Company."

"In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1913.

No. 60282.

In the Matter of the Supplemental Proceedings to Open and Widen Sixth Street from the East Line of Bluff Street to the West Line of Broadway under Ordinance of Kansas City, Missouri, Number 7539.

Affidavit for Appeal.

STATE OF MISSOURI,
County of Jackson, ss:

E. S. North of lawful age, being duly sworn, upon his oath states that he is attorney and agent for the Kansas City, St. Louis & Chicago Railroad Company and The Chicago & Alton Railroad Company, appellants in the above entitled cause; that the appeal prayed for by said Kansas City, St. Louis & Chicago Railroad Company and The Chicago & Alton Railroad Company is not made for vexation or delay but because affiant and the said appellants believe that said appellants are aggrieved by the judgment or decision of the court.

(Signed) E. S. NORTH.

221 Subscribed and sworn to before me this 17th day of October, 1913. My Commission expires September 13, 1917.

[Seal Bertha L. Johnson, Notary Public, Jackson County, Mo.]

(Signed) BERTHA L. JOHNSON,
Notary Public, Jackson County, Missouri."

And afterwards, on the same day, to-wit, on Friday, the 17th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the Court sustained said Application and Affidavit for Appeal so filed in said cause by defendants Kansas City, St. Louis & Chicago Railroad Company and The Chicago & Alton Railroad Company, and granted and allowed said defendants, Kansas City, St. Louis & Chicago Railroad Company and The Chicago & Alton Railroad Company, an appeal in said cause to the Supreme Court of the State of Missouri.

And thereupon the Court fixed the Appeal Bond to be filed by said defendants, Kansas City, St. Louis & Chicago Railroad Company and The Chicago & Alton Railroad Company, in said cause at the sum of One Thousand Dollars—same to be filed on or before ten days after final adjournment of said September Term, 1913 of said Circuit Court.

And thereupon the court granted and allowed said defendants, Kansas City, St. Louis & Chicago Railroad Company and The Chi-

cago & Alton Railroad Company, until on or before the 15th day of December, 1913, within which time to file their Bill of Exceptions herein.

And afterwards, to-wit: on Saturday, the 18th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the defendant, Union Pacific Railroad Company, filed its Application and Affidavit for Appeal and Appeal Bond in said cause in the words and figures following:

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 60282.

In re Condemnation of Sixth Street from Broadway to Bluff Street.

Affidavit for Appeal by Union Pacific Railroad Company.

STATE OF MISSOURI,
County of Jackson, ss:

I. N. Watson, being first duly sworn, on oath states that he is one of the attorneys of record for defendant Union Pacific Railroad Company in the above entitled cause, and, as such agent for said defendant, makes this affidavit for and on behalf of the
222 defendant Union Pacific Railroad Company; that this appeal from the judgment of the Circuit Court of Jackson County, Missouri, at Kansas City, in the above entitled cause against the Union Pacific Railroad Company is not made for vexation or delay, but because affiant believes said Union Pacific Railroad Company is aggrieved by the judgment and decision in the above cause.

(Signed) I. N. WATSON.

Subscribed and sworn to before me this 16th day of October, 1913.

[Seal Raymond Etheridge Watson, Notary Public, Jackson County, Mo.]

(Signed) RAYMOND E. WATSON,
Notary Public, Jackson County, Missouri.

My Commission expires Jan. 23rd, 1916."

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 60282.

In re Condemnation of Sixth Street from Broadway to Bluff Street.

Bond.

Know all men by these presents, that we, Union Pacific Railroad Company, as principal, and H. G. Kaill and I. N. Wilson, as sureties,

are held and firmly bound unto Kansas City in the sum of one thousand dollars ($1,000.00) for the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators, and assigns jointly and severally, firmly by these presents.

Signed by us and dated this 16th day of October, 1913.

The condition of the above obligation is such that, whereas, the Union Pacific Railroad Company has appealed from the judgment rendered against it and in favor of Kansas City in the Circuit Court of Jackson County, Missouri, at Kansas City, in the matter of the condemnation of Sixth Street from Broadway to Bluff Street, wherein benefits were assessed against the Union Pacific Railroad Company in the sum of three thousand dollars, together with costs. Now, if the said Union Pacific Railroad Company shall prosecute its appeal with due diligence to a decision in the Supreme Court of the State of Missouri, and shall perform such judgment as shall be given by the said Supreme Court, or such as the said Supreme Court may direct the said Circuit Court to give, and, if the judgment of the said Circuit Court or any part thereof be affirmed and said appellant shall comply with and perform the same so far as it may be affirmed and pay all damages and costs which may be awarded and assessed against the Union Pacific Railroad Company by the said Supreme Court, or by the said Circuit Court under the direction of
223 the Supreme Court, then this obligation to be void, otherwise to remain in full force and effect.

UNION PACIFIC RAILROAD COMPANY,

(Signed) By WATSON, WATSON & ALFORD,
Attorneys of Record.

(Signed) H. G. KAILL AND

(Signed) I. N. WATSON (*Surety*)."

And afterwards, and on the same day, to-wit: on Saturday, the 18th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court sustained said Application and Affidavit for Appeal so filed in said cause by defendant Union Pacific Railroad Company, and granted and allowed said defendant an appeal in said cause to the Supreme Court of the State of Missouri.

Thereupon the court duly approved said Appeal Bond so filed by defendant Union Pacific Railroad Company in said cause.

Thereupon the court granted and allowed said defendant, Union Pacific Railroad Company, until on or before the 15th day of December, 1913, within which time to file its Bill of Exceptions herein.

And afterwards, to-wit: on Monday, the 20th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the defendants, Kansas City, St. Louis & Chicago Railroad Company, and The Chicago & Alton Railroad Company, filed their Appeal Bond in said cause, which was duly approved by said court—in the words and figures following:

"In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1913.

No. 60282.

In the Matter of the Supplemental Proceedings to Open and Widen Sixth Street from the East Line of Bluff Street to the West Line of Broadway under Ordinance of Kansas City, Missouri, Number 7539.

Bond for Appeal on Behalf of Kansas City, St. Louis & Chicago Railroad Company and The Chicago & Alton Railroad Company.

Know all men by these presents, That we, Kansas City, St. Louis & Chicago Railroad Company and The Chicago & Alton Railroad Company, as principals, and National Surety Company, as surety, do hereby acknowledge ourselves held and firmly bound to pay all of the costs of the appeal taken by the said Kansas City, St. Louis & Chicago Railroad Company and The Chicago & Alton
224 Railroad Company, from the judgment in the above entitled cause, if the said judgment shall be affirmed by the appellate court, or if the appeal of the said Chicago & Alton Railroad Company shall be dismissed.

In witness whereof, we have hereunto set our hands this 18" day of October, 1913.

KANSAS CITY, ST. LOUIS & CHICAGO RAILROAD CO.,
(Signed) By SCARRITT, SCARRITT, JONES & MILLER, *Its Attorneys.*
THE CHICAGO & ALTON RAILROAD COMPANY,
(Signed) By SCARRITT, SCARRITT, JONES & MILLER, *Its Attorneys.*
NATIONAL SURETY COMPANY,
(Signed) By P. O. DRAPER, *Attorney-in-Fact.*

[Seal National Surety Company, Incorporated 1897, New York.]

And afterwards, to-wit: on Saturday, the 22nd day of October, 1913, and at said September Term, 1913, of said Circuit Court, Kansas City, Missouri filed its Motion to Require Appellants to give Additional Appeal Bond in said cause, in the words and figures following:

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 60282.

In the Matter of the Opening and Widening of Sixth Street from Broadway to Bluff Street.

Motion to Require Appellants to Give Additional Appeal Bond.

Now comes Kansas City and shows to the court that appeals have been allowed to the Missouri Pacific Railway Company, the Kansas City, St. Louis & Chicago Railway Company, the Chicago & Alton Railroad Company and the Union Pacific Railroad Company, and that each of said appellants was authorized to give an appeal bond in the sum of One thousand dollars ($1,000.00).

Kansas City further shows to the court that these appeals are from the judgment of the court assessing benefits against said appellants; that damages have been awarded to parties whose property has been taken, and that the allowance to such property owners whose property has been taken has been fixed by final judgment on to-wit: March 8, 1910; and said property owners have demanded, and will demand, that they are entitled to interest from the date when the judgment fixing their damages for property taken became final; that if they are allowed interest on the judgment allowing them such damages for their property taken such interest will greatly exceed the amount of the appeal bond fixed by the court in this proceeding.

225 Kansas City, therefore, prays the court to set aside its order fixing the amount of the appeal bond for each of the appellants in this case, and prays the court that the amount of such bond shall be fixed at a sum which will be commensurate with the amount of interest and costs that may have to be paid on account of such appeals.

(Signed) A. F. EVANS,
Attorney for Kansas City."

And afterwards, to-wit: on Saturday, the 25th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the defendant St. Louis & San Francisco Railroad Company filed its Application and Affidavit for Appeal in said cause in the words and figures following:

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 60282.

In the Matter of Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street.

Application and Affidavit for Appeal of St. Louis & San Francisco Railroad Company.

STATE OF MISSOURI,
County of Jackson, ss:

Now comes Arthur H. Morse, of lawful age, and being first duly sworn on oath says: That he is Attorney for the above named defendant, St. Louis & San Francisco Railroad Company, which company prays for an appeal of the above entitled cause to the Supreme Court of Missouri, and that he makes this affidavit for and in its behalf.

Affiant further states that such appeal is not made for vexation or delay, but because he believes that appellant, St. Louis & San Francisco Railroad Company, is aggrieved by the judgment and decision of the Circuit Court of Jackson County, Missouri, at Kansas City, in the above entitled cause.

(Signed) ARTHUR H. MORSE.

Subscribed and sworn to before me this 24 day of October, 1913.

[Seal Demie T. Stubblefield, Notary Public, Jackson County, Mo.]

(Signed) DEMIE T. STUBBLEFIELD,
Notary Public.

My commission expires September 8, 1917."

And afterwards, and on the same day, to-wit: on Saturday, the 25th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court sustained said Application and Affidavit for Appeal so filed in said cause by defendant St. Louis &
226 San Francisco Railroad Company, and granted and allowed said defendant an appeal in said cause to the Supreme Court of the State of Missouri.

And thereupon the court fixed the Appeal Bond to be filed by said defendant, St. Louis & San Francisco Railroad Company, in said cause at the sum of One Thousand Dollars—same to be filed on or before ten days after final adjournment of said September Term, 1913, of said Circuit Court.

And thereupon the court granted and allowed said defendant, St. Louis & San Francisco Railroad Company, until on or before the 15th day of December, 1913, within which time to file its Bill of Exceptions herein.

And Afterwards, and on the same day, to-wit: on Saturday, the 25th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the defendant Kansas City Stock Yards Company of Missouri filed its Application and Affidavit for Appeal in the said cause in the words and figures following:

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 60282.

In the Matter of the Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street.

Application and Affidavit for Appeal of The Kansas City Stock Yards Company of Missouri.

STATE OF MISSOURI,
County of Jackson, ss:

Now comes Arthur H. Morse, of lawful age, and being first duly sworn upon oath, says: That he is attorney for the above named defendant, The Kansas City Stock Yards Company of Missouri, which company prays for an appeal of the above entitled cause to the Supreme Court of Missouri, and that he makes this affidavit for and in its behalf.

Affiant further states that such appeal is not made for vexation or delay, but because he believes that appellant, The Kansas City Stock Yards Company of Missouri, is aggrieved by the judgment and decision of the Circuit Court of Jackson County, Missouri, at Kansas City, in the above entitled cause.

(Signed) ARTHUR H. MORSE.

Subscribed and sworn to before me this 24 day of October, 1913.

[Seal Demie T. Stubblefield, Notary Public, Jackson County, Mo.]

(Signed) DEMIE T. STUBBLEFIELD,
Notary Public.

My commission expires September 8, 1917.

227 And afterwards, and on the same day, to-wit: on Saturday, the 25th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court sustained said Application and Affidavit for Appeal so filed in said cause by defendant Kansas City Stock Yards Company of Missouri, and granted and allowed said defendant Kansas City Stock Yards Company of Missouri, an appeal in said cause to the Supreme Court of the State of Missouri.

And thereupon the court fixed the Appeal Bond to be filed by said defendant, Kansas City Stock Yards Company of Missouri, in said cause at the sum of One Thousand Dollars—same to be filed on or

before ten days after final adjournment of said September Term, 1913, of said Circuit Court.

And thereupon the court granted and allowed said defendant, Kansas City Stock Yards Company of Missouri, until on or before the 15th day of December, 1913, within which time to file their Bill of Exceptions herein.

And afterwards and on the same day, to-wit: on Saturday, the 25th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the defendant State Line Improvement Company filed its Application and Affidavit for Appeal in the said cause in the words and figures following:

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 60282.

In the Matter of the Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street.

Application and Affidavit for Appeal of State Line Improvement Company.

STATE OF MISSOURI,
County of Jackson, ss:

Now comes Arthur H. Morse, of lawful age, and being first duly sworn upon oath, says: That he is attorney for the above named defendant, State Line Improvement Company, which Company prays for an appeal of the above entitled cause to the Supreme Court of Missouri, and that he makes this affidavit for and in its behalf.

Affiant further states that such appeal is not made for vexation or delay, but because he believes that appellant, State Line Improvement Company, is aggrieved by the judgment and decision of the Circuit Court of Jackson County, Missouri, at Kansas City, in the above entitled cause.

(Signed) ARTHUR H. MORSE.

228 Subscribed and sworn to before me this 24 day of October, 1913.

[Seal Demie T. Stubblefield, Notary Public, Jackson County, Missouri.]

(Signed) DEMIE T. STUBBLEFIELD,
Notary Public.

My commission expires September 8, 1917."

And afterwards, and on the same day, to-wit: on Saturday, the 25th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court sustained said Application and Affidavit for Appeal so filed in said cause by defendant, State Line Improvement Company, and granted and allowed said defendant, State Line

Improvement Company, an appeal in said cause to the Supreme Court of the State of Missouri.

And thereupon the court fixed the Appeal Bond to be filed by said defendant, State Line Improvement Company, in said cause *of* the sum of One Thousand Dollars—same to be filed on or before ten days after final adjournment of said September Term, 1913, of said Circuit Court.

And thereupon the court granted and allowed said defendant, State Line Improvement Company, until on or before the 15th day of December, 1913, within which time to file its Bill of Exceptions herein.

And afterwards, and on the same day, to-wit: on Saturday, the 25th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the defendant, The Edgewater Terminal Railway Company, filed its Application and Affidavit for Appeal in said cause in the words and figures following, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1913.

In the Matter of the Condemnation of Property for the Widening of Sixth Street from Broadway to Bluff Street, Kansas City, Missouri.

No. 60282.

Application and Affidavit for Appeal of the Edgewater Terminal Railway Company.

I, Martin Lyons, of lawful age, being duly sworn, upon oath state that I am agent and attorney for The Edgewater Terminal Railway Company, in the above action, and pray for an appeal in this cause to the Supreme Court of Missouri, and I further state that such appeal is not made for vexation or delay, but because this affiant believes that said appellant is aggrieved by the judgment and decision of the above named court in said cause.

MARTIN LYONS,
Agent and Attorney for The Edgewater Terminal Railway Company.

229 Subscribed and sworn to before me, a Notary Public, within and for Jackson County, Missouri, this 15th day of October, 1913.

My commission expires 9th day of August, 1917.

[Seal Marcia Jennings, Notary Public, Jackson County, Mo.]

MARCIA JENNINGS,
Notary Public, Jackson County."

And afterwards, and on the same day, to-wit: on Saturday, the 25th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court sustained said Application and Affidavit

for Appeal so filed by defendant, The Edgewater Terminal Railway Company, and granted and allowed said defendant an appeal in said cause to the Supreme Court of the State of Missouri.

And afterwards, and on the same day, to-wit: on Saturday, the 25th day of October, 1913, and at said September Term, 1913, of said Circuit Court the court sustained said Application and Affidavit for Appeal so filed by defendant, The Edgewater Terminal Railway Company, and granted and allowed said defendant an appeal in said cause to the Supreme Court of the State of Missouri.

And afterwards, and on the same day, to-wit, on Saturday, the 25th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the defendant, The Edgewater Terminal Railway Company filed its Appeal Bond in said cause in the words and figures following, to-wit:

"Bond for Appeal.

In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 60282.

In the Matter of the Widening of Sixth Street from Broadway to Bluff Street, Kansas City, Missouri.

Know all men by these presents: That we, The Edgewater Terminal Railway Company, as principal, and H. T. Abernathy, and W. A. Wilson as sureties, are held and firmly bound unto the city of Kansas City, Missouri, in the sum of One Thousand and no/100 ($1000.00) Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated at Kansas City, Missouri, this 25th day of October, A. D. 1913.

The condition of the above obligation is such, that whereas The Edgewater Terminal Railway Company has appealed from the judgment rendered against it in favor of the city of Kansas City, in the Circuit Court of Jackson County, Missouri.

230 Now, if said appellant shall prosecute said appeal with due diligence, to a decision in the Supreme Court of Missouri, and shall perform such judgments as shall be given by the Supreme Court of Missouri, or such as the Supreme Court of Missouri may direct the Circuit Court of Jackson County, Missouri, to give, and pay all costs which may be awarded against it by the Supreme Court of Missouri, then this obligation to be void, otherwise to remain in full force and effect.

[Corporate Seal Edgewater Terminal Railroad Company.]

THE EDGEWATER TERMINAL RAILWAY COMPANY,
By E. G. MERRIAM, *Vice President.*
F. W. IRLAND, *Secretary.*
H. T. ABERNATHY, [SEAL.]
—— ——, *Sureties"* [SEAL.]

And afterwards, and on the same day, to-wit: on Saturday, the 25th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court approved said Appeal Bond filed by said defendant, The Edgewater Terminal Railway Company.

And thereupon the court granted and allowed said defendant, The Edgewater Terminal Railway Company, until on or before the 15th day of December, 1913, within which time to file its Bill of Exceptions in said cause.

And afterwards, and on the same day, to-wit: on Saturday, the 25th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the defendant, The Missouri Pacific Railway Company, filed its Appeal Bond in said cause in the words and figures following, to-wit:

"Bond for Appeal.

In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 60282.

In the Matter of the Widening of Sixth Street from Broadway to Bluff Street, Kansas City, Missouri.

Know all men by these presents: That we, The Missouri Pacific Railway Company, as principal, and H. T. Abernathy and W. A. Wilson as sureties, are held and firmly bound unto the city of Kansas City, Missouri, in the sum of One Thousand and no/100 ($1000.00) Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated at Kansas City, Missouri, this 25th day of October, A. D. 1913.

The condition of the above obligation is such that whereas The Missouri Pacific Railway Company has appealed from the
231 judgment rendered against it in favor of the city of Kansas City, in the Circuit Court of Jackson County, Missouri.

Now, if said appellant shall prosecute said appeal with due diligence, to a decision in the Supreme Court of Missouri, and shall perform such judgments as shall be given by the Supreme Court of Missouri, or such as the Supreme Court of Missouri may direct the Circuit Court of Jackson County, Missouri, to give, and pay all costs which may be awarded against it by the Supreme Court of Missouri, then this obligation to be void, otherwise to remain in full force and effect.

[The Missouri Pacific Railway Company (Edgewater Terminal Railway Company Corporate Seal), 1909].

THE MISSOURI PACIFIC RAILWAY COMPANY,
By MARTIN L. CLARDY, *Vice President.*
H. T. ABERNATHY, [SEAL.]
W. A. WILSON, [SEAL.]
Sureties.

Attest:
F. W. IRELAND, *Secretary.*"

And afterwards, and on the same day, to-wit: On Saturday, the 25th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court approved said Appeal Bond so filed by defendant, The Missouri Pacific Railway Company, in said cause.

And afterwards, and on the same day, to-wit: on Saturday, the 25th day of October, 1913, and at said September Term, 1913, of said Circuit Court the defendants, Chicago, Burlington & Quincy Railroad Company and the St. Louis and Kansas City Land Company, filed their Application and Affidavit for Appeal in said cause in the words and figures following:

"In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1913.

No. 60282.

In the Matter of the Supplemental Proceedings under Ordinance No. 7539 to ascertain and assess benefits against certain pieces and parcels of land included within the Benefit District prescribed by Ordinance No. 3209, approved October 19th, 1909, and entitled "An Ordinance to Open and Widen Sixth Street from the East Line of Bluff Street to the West Line of Broadway."

Application and Affidavit for Appeal on Behalf of Chicago, Burlington & Quincy Railroad Company and St. Louis — Kansas City Land Company.

Now comes the Chicago, Burlington & Quincy Railroad Company and St. Louis & Kansas City Land Company, and sev-
232 erally pray the court that they and each of them be granted and allowed an appeal from the final judgment and decision of this court in the above entitled cause, to the Supreme Court of the State of Missouri, and accompany their application with formal affidavit for appeal.

WARNER, DEAN, McLEOD & LANGWORTHY,
Attorneys for Chicago, Burlington & Quincy Railroad Company and St. Louis & Kansas City Land Co.

Affidavit for Appeal.

STATE OF MISSOURI,
County of Jackson, ss:

H. M. Langworthy of lawful age, being duly sworn, says that he is agent and attorney for the Chicago, Burlington & Quincy Railroad Company and the St. Louis & Kansas City Land Company, appellants herein, and as such agent and attorney, is authorized to and

does make this affidavit for and on behalf of said companies and each of them.

Affiant further states that the appeal of said Chicago, Burlington & Quincy Railroad Company is not taken or made for vexation or delay, but because the affiant believes that the appellant Chicago, Burlington & Quincy Railroad Company is aggrieved by the judgment and decision of the court.

And affiant further states that the appeal of said St. Louis and Kansas City Land Company is not taken or made for vexation or delay, but because the affiant believes that the appellant St. Louis and Kansas City Land Company is aggrieved by the judgment and decision of the court.

Affiant further states that the interest which the said Chicago, Burlington & Quincy Railroad Company has in said proceedings is that it is the owner of the following described tracts of land among others situated in the Benefit District, described in said Ordinance No. 3209, all situated in Kansas City, Jackson County, Missouri, to-wit:

A parcel of land in the N. W. ¼ of the S .W. ¼ of Sec. 7, Twp. 49, Range 33.

Also two tracts of land in the N. E. ¼ of Sec. 6, Twp. 49, Range 33, located in Coates & Hopkins' Eighth Street Subdivision.

Also a tract of land in the S. W. ¼ of the N. E. ¼ of Sec. 6, Twp. 49, Range 33.

Also a tract of land in the N. E. ¼ of the N. E. ¼ of Sec. — Twp. 49, Range 33.

Also two tracts of land in the N. E. ¼ of the N. W. ¼ of Sec. 7, Twp. 49, Range 33.

Also a tract of land in Sec. 6, Twp. 49, Range 33.

Also a tract of land in the S. E. ¼ of the S. W. ¼ of Sec. 6, Twp. 49, Range 33.

233 Also a part of Lot 10, of Campbell Block, an Addition to Kansas City.

Also a part of Lots 5, 6, and 7, of Block 6, and a part of Lots 1 and 2, 3 and 10, of Block 3, and a part of Lot 4, Block 6, and parts of Lots 2, 3 and 4, Block 8, and the East 50 feet of Lot 5, Block 8, and the east fifty feet of Lots 6 to 14 inclusive of Block 8, all in Lykin's Addition to Kansas City; and also Lots 15, 16 and 17, of Block 2, of West Kansas Addition No 2, an addition to Kansas City.

Affiant further states that the interest which the St. Louis and Kansas City Land Company has in said proceedings is that it is owner of the following described tracts of land, among others, situated in the Benefit District described in said Ordinance No. 3209, all situated in Kansas City, Jackson County, Missouri, to-wit:

Lots 6 and 7, Block 2, Lykin's Addition to Kansas City, Missouri.

Part of Lot 3, Block 3, of Lykin's Addition to Kansas City.

Lots 4 and 5, of Block 6, in Lykin's Addition to Kansas City.

Part of Lot 1, in Block 3, in Lykin's Addition to Kansas City.

All of lots 6, 7, 8 and 9 of Block 6, South of the right of way of the Hannibal & St. Joseph Railroad Company, in Lykin's Addition

to Kansas City; the east 160 feet of Block 34, of West Kansas Addition to Kansas City.

Lots in Block 3, of West Kansas Addition No. 2, to Kansas City.

Parts of Lots 9, 10, 11, 12 and 13, of Campbell Block, an addition to Kansas City.

All of Block 20, of West Kansas Addition to Kansas City.

All of Lots 1 to 12 inclusive, and all of Lots 15 to 24 inclusive, of Block 21, of West Kansas Addition No. 1, to Kansas City.

Affiant further says that all of said property has been assessed and charged by the terms of said verdict and said judgment in said proceedings with large sums of money as benefits to pay damages for the property sought to be taken herein.

H. M. LANGWORTHY.

Subscribed and sworn to before me a notary public, within and for Jackson County, Missouri, this 25th day of October, 1913.

My commission expires Sept. 26th, 1916.

[Seal Randolph P. Rogers, Notary Public, Jackson County, Mo.]

RANDOLPH P. ROGERS,
Notary Public."

234 And afterwards, and on the same day, to-wit: on Saturday, the 25th day of October, 1913, and at said September Term, 1913 of said Circuit Court, the Court sustained said Application and Affidavit for Appeal so filed by defendants, Chicago, Burlington & Quincy Railroad Company, and St. Louis and Kansas City Land Company, and granted and allowed said defendants an Appeal in said cause to the Supreme Court of the State of Missouri.

And thereupon the court fixed the appeal Bond to be filed by said defendants in said cause at the sum of One Thousand Dollars, the same to be filed on or before ten days after final adjournment of said September Term, 1913, of said Circuit Court.

Thereupon the court granted and allowed said defendants, Chicago, Burlington & Quincy Railroad Company, and St. Louis and Kansas City Land Company, until on or before the 15th day of December, 1913, within which time to file their Bill of Exceptions herein.

And afterwards, and on the same day, to-wit: on Saturday the 25th day of October, 1913, and at said September Term, of said Circuit Court, the defendant the Chicago, Rock Island and Pacific Railway Co. filed its Application and Affidvit for Appeal and Appeal Bond in said cause in words and figures following:

"In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1913.

No. 60282.

In the Matter of the Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street.

Affidavit for Appeal.

STATE OF MISSOURI,
County of Jackson, ss:

John D. Wendorff, being first duly sworn, upon his oath says that he is the agent and attorney for The Chicago, Rock Island and Pacific Railway Company, one of the defendants and owner of property in the benefit district described in the above proceeding, and hereinafter set out, and as such has authority to and makes this affidavit for and in behalf of said The Chicago, Rock Island and Pacific Railway Company; that this appeal is not made for vexation or delay, but because affiant believes that the appellant, The Chicago, Rock Island and Pacific Railway Company, is aggrieved by the judgment and decision of the court in the above entitled cause and proceeding.

Affiant further says that said The Chicago, Rock Island and Pacific Railway Company is the owner of certain property hereinafter set out which said property is included with- the limits
235 of the benefit district prescribed by ordinance in the above proceedings and against which special benefits were assessed by the jury in said proceeding, which said property is described as follows:

Lots 1 to 14, both inclusive, and the east 16 ft. of Lots 15 to 20, both inclusive, and the West 111.5 ft. of Lots 15 to 26, both inclusive, all in Block 7; Lots 1, 2 and 33 in Block 8; Lots 1 to 7, both inclusive, and the east 41.5 ft. of Lots 8 and 9, and the east 86 feet of Lots 8 and 9, and Lot 10, in Block 10; the West 112.5 feet of Lot 11, East 15 feet of Lot 11, Lots 12, 13 and 14, in Block 10, all in 2nd Plat of Depot Addition.

Lot 25, East 127.5 feet and the west 41.5 feet of Lot 26; East 127.5 feet and the west 41.5 feet of Lot 27; and the East 127.5 and West 41.5 feet of Lot 28; and the West 41.5 feet of the North 115 feet of Lot 28, all in Seeger's Addition.

West 30 feet of Lots 1, 2, 3, 4, 8, 10, 11, 12 and 13, in Block 11; all in Skiles & Western's Addition.

Part of the Northwest Quarter of the Northwest Quarter, Section 7, Township 49, Range 33, as follows:

Beginning on the East line of the 30 foot right of way of C. R. I. & P. Ry. Co., which point is 65 feet South of North line of Seventeenth Street, and 119.25 feet West of West line of Wyoming Street; thence south parrallel with Wyoming Street along said East line of right of way 377.9 feet, thence Southwesterly along said East

line of right of way on a curve whose radius is 414.3 feet, a distance of 201.9 feet to a point which is 7 feet East of said East line of right of way; thence North 7 feet distant from and parallel to East line of right of way 377.9 feet to a point, thence West 7 feet to beginning.

Wherefore defendant, The Chicago, Rock Island and Pacific Railway Company, prays the court to grant it an appeal in the above entitled cause and proceedings to the Supreme Court of the State of Missouri.

JOHN D. WENDORFF.

Subscribed and sworn to before me this 22nd day of October, 1913.

My commission expires April 24th, 1916.

[Seal Jesse M. Hampel, Notary Public, Jackson County, Mo.]

JESSE M. HAMPEL,
Notary Public in and for
Jackson County, Missouri."

236 "In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1913.

No. 30282.

In the Matter of the Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street.

Appeal Bond.

Know all men by these presents: That, we, The Chicago, Rock Island and Pacific Railway Company, as principal, and Geo. S. Hovey and R. M. Cook as sureties, are held and firmly bound unto Kansas City, Missouri, in the sum of One Thousand Dollars ($1,000), for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and assigns, jointly and severally, firmly by these presents.

Signed by us and dated at Kansas City, Missouri, this 23rd day of October, 1913.

The condition of the above obligation is such that, whereas, The Chicago, Rock Island and Pacific Railway Company has appealed from the judgment rendered against it and in favor of Kansas City, Missouri, in the Circuit Court of Jackson County, Missouri, on or about the 18th day of September, 1913, for the sum of $1,324.94, together with costs.

Now, if said The Chicago, Rock Island and Pacific Railway Company, appellant, shall prosecute its appeal with due diligence to a decision in the appellate court, and should the judgment of said Circuit Court be affirmed by the appellate court, or should such

appeal be dismissed, it will pay all costs of this appeal, and shall perform such judgment as the appellate court may direct the Circuit Court to give, and will pay all costs which may be awarded against appellant by any appellate court, then this obligation to be void, otherwise to remain in full force and effect.

In witness whereof, said The Chicago, Rock Island and Pacific Railway Company has caused this bond to be executed by Paul E. Walker, its agent and attorney, and said Geo. S. Hovey and R. M. Cook have hereunto set their hands.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
By PAUL E. WALKER, *Its Agent and Attorney.*
GEO. S. HOVEY. [SEALS.]
R. M. COOK. [SEALS.]

And afterward, and on the same day, to-wit: on Saturday, the 25th day of October, 1913, and at said September Term, of said Circuit Court the court sustained said Application and Affidavit for Appeal so filed by defendant, Chicago, Rock Island and Pacific Railway Company, and granted and allowed said defendant an appeal in said cause to the Supreme Court of the State of Missouri.

237 Thereupon the court approved the Appeal Bond filed in said cause by said defendant, Chicago, Rock Island and Pacific Railway Company.

Thereupon the court granted and allowed said defendant, Chicago, Rock Island and Pacific Railroad Company, until on or before the 15th day of December, 1913, within which time to file its Bill of Exceptions in said cause.

And afterwards, and on the same day, to-wit: on Saturday, the 25th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the defendant, Federal Investment Company filed its Application and Affidavit of Appeal and its Appeal Bond in said cause in the words and figures following:

"In the Circuit Court of Jackson County, at Kansas City, Missouri, Division No. 3.

No. 60282.

In the Matter of Condemnation Proceedings for Opening and Widening Sixth Street from Broadway to Bluff Street.

Bond for Appeal of Defendant Federal Investment Company.

Know all men by these presents:

That we, the Federal Investment Company as principal and H. M. Meriwether and —— ——, as sureties, are held and firmly bound to Kansas City, Missouri, in the sum of One Thousand Dol-

lars ($1,000.00), for the payment of which well and truly to be made, we bind ourselves, our successors, heirs and legal representatives by these presents.

The condition of the above obligation is such that, whereas the above bounden Federal Investment Company has appealed from the judgment and decision of the Circuit Court of Jackson County, at Kansas City, Missouri, in the above entitled and numbered cause; now, therefore: If said appellant will pay all costs of said appeal should the judgment of the Circuit Court be affirmed by the appellate court or should such appeal be dismissed, then this obligation shall be void; otherwise it shall be and remain in full force and effect.

FEDERAL INVESTMENT COMPANY,
By H. M. MERIWETHER, *President.*
H. M. MERIWETHER.

238 "In the Circuit Court of Jackson County, at Kansas City, Missouri, Division Number 3.

No. 60282.

In the Matter of Condemnation Proceedings for Opening and Widening Sixth Street from Broadway to Bluff Street.

Affidavit for Appeal of Federal Investment Company.

STATE OF MISSOURI,
County of Jackson, ss:

Hunter M. Meriwether, being duly sworn, on his oath states that he is president and agent of the Federal Investment Company, defendant in the above entitled cause and owner of property assessed with benefits by the verdict and judgment of the court, and makes this affidavit for and on behalf of said Federal Investment Company; that said Federal Investment Company prays an appeal from the judgment of the court herein; that such appeal is not made for vexation or delay but because affiant believes that said appellant is aggrieved by the judgment and decision of the court.

HUNTER M. MERIWETHER.

Subscribed and sworn to before me this 25th day of October, 1913.

My commission expires on the 4th day of April, 1917.

[Seal Lottie Hoskins, Notary Public, Jackson County, Mo.]

LOTTIE HOSKINS,
Notary Public in and for
Jackson County, Missouri.

And afterwards, and on the same day, to-wit: on Saturday, the 25th day of October, 1913, and at said September Term, 1913, of

said Circuit Court, the court sustained said Application and Affidavit for Appeal so filed by defendant, Federal Investment Company, and granted and allowed said defendant an appeal in said cause to the Supreme Court of the State of Missouri.

And thereupon the court approved the Appeal Bond so filed by defendant, Federal Investment Company, in said cause.

And thereupon the court granted and allowed said defendant, Federal Investment Company, until on or before the 15th day of December, 1913, within which time to file their Bill of Exceptions in said cause.

And afterwards, and on the same day, to-wit: on Saturday the 25th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the defendant, Union Depot Bridge and Terminal Railroad Company filed its Application and Affidavit of Appeal and its Appeal Bond in said cause in the words and figures following:

239 "In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1913.

No. 60282.

In the Matter of the Supplemental Proceedings for Opening and Widening of Sixth Street from the East Line of Bluff Street to the West Line of Broadway.

STATE OF MISSOURI,
County of Jackson, ss:

F. W. Fratt, of lawful age, being first duly sworn upon his oath deposes and says that he is the President of the Union Depot Bridge and Terminal Railroad Company, and makes this affidavit for it in its behalf; that the said Union Depot Bridge and Terminal Railroad Company is the owner and in possession of the following described lots, tracts, and parcels of land, lying, being and situate in Kansas City, Jackson County, Missouri, and embraced within the limits of the benefits as established by Ordinance No. 3209 approved October 19, 1909, and assessed with benefits by the verdict and judgment herein, to-wit:

"Against part of Section Thirty-two (32) Township Fifty (50), Range Thirty-three (33) described as follows: Beginning at the Northwest corner of Lot One (1), Block "A" Old Town Reservation; thence Northeastwardly along the North line of Blocks "A", "B", "C" and "D" in said Addition and said North line produced to the Easterly line of Lot Ten (10), Block "D", said Old Town Reservation; thence Northwestwardly along the Easterly line of said Lot Ten (10), produced North One Thousand Ninety-four (1094) feet to the Harbor Line; thence Southwestwardly Seven Hundred Sixty (760) feet; thence Southeastwardly Fifty (50) feet; thence

Southwesterly One Hundred Thirty-nine and five-tenths (139-5); thence Southeasterly to point of beginning.

and

"Against part of Section Thirty-two (32), Township Fifty (50), Range Thirty-three (33), described as follows: Beginning at the intersection of the Harbor Line with the center line of Harrison Street produced from the South; thence Northeastwardly along the Harbor Line to the Center line of Forest Avenue, produced from the South; thence Southwardly along said produced Center line of Forest Avenue to the East line of said Section; thence South along said East line to an intersection with the North Line of Block "G", Old Town Reservation, produced Northeastwardly; thence Southeastwardly along the North line of Blocks "G" and "F", and said North line produced, to the Center line of Harrison Street; thence Northwestwardly along the Center line of Harrison Street, produced to point of beginning."

that the appeal prayed for by the Union Depot Bridge and Terminal Railroad Company is not made for vexation or delay but because said appellant considers itself aggrieved by the judgment and decision of the court.

F. W. FRATT.

240 Subscribed and sworn to before me this 22nd day of October, 1913.

My commission expires on the 26th day of June, 1917.

[Seal Edith L. Sturman, Notary Public, Jackson County, Mo.]

EDITH L. STURMAN,
Notary Public in and for Jackson County, Missouri.

"In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1913.

No. 60282. R. 85891.

In the Matter of the Supplemental Proceedings for Opening and Widening of Sixth Street from East Line of Bluff Street to the West Line of Broadway.

Appeal Bond.

STATE OF MISSOURI,
County of Jackson, ss:

Know all men by these presents: That we, the Union Depot Bridge and Terminal Railroad Company, a corporation as principal, and —— —— as Surety, are held and firmly bound unto the City of Kansas City, Missouri, a municipal corporation in the sum of One Thousand ($1,000.00) Dollars, for the payment of which well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

In witness whereof, we have subscribed our names this — day of October, 1913.

The condition of the above obligation is such that:

Whereas, the above bounden principal, Union Depot Bridge and Terminal Railroad Company, had appealed from a special judgment rendered against it in favor of Kansas City, in the above entitled proceedings in the Circuit Court of Jackson County, Missouri, on the 11th day of October, 1913.

Now if said appellant shall prosecute its said appeal with due diligence to a decision in the Supreme Court of the State of Missouri, and shall perform such judgment as shall be given by said Supreme Court, or such as the said Supreme Court may direct the said Circuit Court to give, and if the judgment of said Circuit Court or any part thereof be affirmed and said appellant shall comply with and perform the same so far as it may be affirmed and pay all damages and costs which may be awarded against it by the said Supreme Court, then this obligation shall be void; otherwise to remain in full force and effect.

UNION DEPOT BRIDGE AND
TERMINAL RAILROAD CO.,
By F. W. FRATT, *President.*

241 Attest:
HUGH J. CURRAN, *Secretary.*

NATIONAL SURETY COMPANY,
By P. O. DRAPER AND
W. H. GLASNIR,
Attorneys-in-Fact."

[Corporate seal Union Depot Bridge and Terminal Railroad Company, Incorporated, May 10, 1901.]

[Seal National Surety Company, Incorporated, 1897, New York.]

And afterwards, and on the same day, to-wit: on Saturday, the 25th day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court sustained the Application and Affidavit for Appeal so filed by defendant Union Depot Bridge and Terminal Railroad Company in said cause, and granted and allowed said defendant an appeal to the Supreme Court of the State of Missouri.

Thereupon the court approved the Appeal Bond filed by said defendant Union Depot Bridge and Terminal Railroad Company; and granted and allowed said defendant until on or before December 15th, 1913, within which time to file its Bill of Exceptions in said cause.

And afterwards, to-wit: on Friday, the 31st day of October, 1913, and at said September Term, 1913, of said Circuit Court, the defendant, Chicago, Burlington & Quincy Railroad Company filed its Appeal Bond in said cause in the words and figures following, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1913.

No. 60282.

In the Matter of the Supplemental Proceedings under Ordinance No. 7539 to Ascertain and Assess Benefits against Certain Pieces and Parcels of Land Included within the Benefit District Prescribed by Ordinance No. 3209, Approved October 19th, 1909, and Entitled "An Ordinance to Open and Widen Sixth Street from the East Line of Bluff Street to the West Line of Broadway."

Appeal Bond of Chicago, Burlington & Quincy Railroad Company.

We, the undersigned Chicago, Burlington & Quincy Railroad Company, as principal, and United States Fidelity & Guaranty Company, a corporation, as surety, do hereby acknowledge ourselves jointly and severally bound unto Kansas City, a municipal corporation of Jackson County, Missouri, in the sum of One
242 Thousand Dollars ($1,000.00) to be levied of our respective lands and tenements, goods and chattel- upon this condition:

Whereas the said Chicago, Burlington & Quincy Railroad Company has been allowed and has taken an appeal from the final judgment of the said Circuit Court rendered against it in said cause at the September term, 1913, thereof, to the Supreme Court of the State of Missouri.

Now, if said Chicago, Burlington & Quincy Railroad Company shall and will prosecute its said appeal with due diligence to a decision in the Appellate Court and shall pay all costs of its said appeal if the judgment of the Circuit Court shall be affirmed by the Appellate Court, or if its said appeal be dismissed and if said Company shall perform such judgment as shall be given by such Appellate Court or such as the Appellate Court may direct the Circuit Court to give, and if the judgment of such court or any part thereof be affirmed, it shall and will comply with and perform the same so far as it may be affirmed, and will pay all damages and costs which may be awarded against it by any Appellate Court, then the foregoing obligation shall be null and void. Otherwise it shall remain in full force and effect.

Executed at Kansas City, this 30th day of October, 1913.

CHICAGO, BURLINGTON & QUINCY RAILROAD CO.,
By WARNER, DEAN, McLEOD & LANGWORTHY, *Its Agents and Attorneys.*
UNITED STATES FIDELITY & GUARANTY COMPANY,
By J. L. CROSS, *Attorney-in-Fact.*"

[Seal United States Fidelity & Guaranty Company, Incorporated 1896.]

And afterwards, and on the same day, to-wit: on Friday, the 31st day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court approved said Appeal Bond so filed in said cause by defendant, Chicago, Burlington & Quincy Railroad Company."

And afterwards, and on the same day, to-wit: on Friday, the 31st day of October, 1913, and at said September Term, 1913, of said Circuit Court, the Defendant, St. Louis & Kansas City Land Company filed its Appeal Bond in said cause in the words and figures following:

243 In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1913.

No. 60282.

"In the Matter of the Supplemental Proceedings under Ordinance No. 7539 to Ascertain and Assess Benefits against Certain Pieces and Parcels of Land Included within the Benefit District Prescribed by Ordinance No. 3209, Approved October 19th, 1909, and Entitled "An Ordinance to Open and Widen Sixth Street from the East Line of Bluff Street to the West Line of Broadway."

Appeal Bond of St. Louis & Kansas City Land Company.

We, the undersigned, St. Louis & Kansas City Land Company, as principal, and United States Fidelity & Guaranty Company, a corporation, as surety, do hereby acknowledge ourselves jointly and severally bound unto Kansas City, a municipal corporation of Jackson County, Missouri, in the sum of One Thousand Dollars ($1000.00) to be levied of our respective lands and tenements, goods and chattels upon this condition:

Whereas the said St. Louis and Kansas City Land Company has been allowed and has taken an appeal from the final judgment of the said Circuit Court rendered against it in said cause at the September term, 1913, thereof, to the Supreme Court of the State of Missouri.

Now, if said St. Louis & Kansas City Land Company shall and will prosecute its said appeal with due diligence to a decision in the Appellate Court and shall pay all costs of its said appeal if the judgment of the Circuit Court shall be affirmed by the Appellate Court, or if its said appeal be dismissed and if said Company shall perform such judgment as shall be given by such Appellate Court or such as the Appellate Court may direct the Circuit Court to give, and if the judgment of such court or any part thereof be affirmed, it shall and will comply with and perform the same so far as it may be affirmed, and will pay all damages and costs which may be awarded against it by any Appellate Court, then the foregoing

obligation shall be null and void. Otherwise it shall remain in full force and effect.

Executed at Kansas — this 30th day of October, 1913.

ST. LOUIS AND KANSAS CITY LAND CO.,

By WARNER, DEAN, McLEOD & LANGWORTHY, *Its Agents and Attorneys.*

UNITED STATES FIDELITY & GUARANTY COMPANY,

By J. L. CROSS, *Attorney-in-Fact.*"

[Seal United States Fidelity & Guaranty Company, Incorporated 1896.]

244 And afterwards, and on the same day, to-wit: on Friday the 31st day of October, 1913, and at said September Term, 1913, of said Circuit Court, the court approved said Appeal Bond so filed in said cause by defendant, St. Louis and Kansas City Land Company.

And afterwards, to-wit: on Thursday, the 6th day of November, 1913, and at said September Term, 1913, of said Circuit Court, The Missouri, Kansas & Texas Railway Company and Missouri, Kansas & Texas Terminal Company of Kansas City, filed their stipulation in said cause, in the words and figures following:

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 60282.

In the Matter of Condemnation Proceedings for Widening of Sixth Street from Broadway to Bluff Streets, in Kansas City, Missouri.

Stipulation.

Whereas the Missouri, Kansas & Texas Railway Company and the Missouri, Kansas & Texas Terminal Company of Kansas City are a party to the above proceeding, and

Whereas they heretofore filed their motions for a new trial in said proceeding in the Circuit Court of Jackson County, Missouri, and

Whereas said motions for a new trial were by the court overruled, and

Whereas other parties, including the Union Pacific Railroad Company, also filed motions for new trial in said proceedings, which were overruled at the October, 1913, term of this court, and

Whereas said Union Pacific Railroad Company has appealed said case to the Appellate Court, and

Whereas it is agreed between Kansas City, Missouri and Missouri, Kansas & Texas Railway Company and the Missouri, Kansas & Texas Terminal Company of Kansas City, that in order to avoid the expense, time and trouble of encumbering the record by said two last named Companies taking an appeal in this case, that, so

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far as they and their property are concerned and the taxes assessed against same, they shall remain and abide the result of the appeal of said Union Pacific Railroad Company, although said Missouri, Kansas & Texas Railway Company and Missouri, Kansas & Texas Terminal Company of Kansas City do not perfect their appeal in said matter.

Now, therefore, it is hereby stipulated and agreed that said Missouri, Kansas & Texas Railway Company and Missouri, Kansas & Texas Terminal Company of Kansas City need not perfect their appeal in said matter, but this case and proceeding, so far as
245 they are concerned, shall remain and abide the result of the appeal of said Union Pacific Railroad Company.

(Signed) HADLEY, COOPER, NEEL & WILSON,

(Signed) J. W. JAMISON,

Attorneys for Missouri, Kansas & Texas Railway Company and Missouri, Kansas & Texas Terminal Company of Kansas City.

Parts stricken out by K. C., Mo., before signing.

(Signed) KANSAS CITY,
By J. C. PETHERBRIDGE,
Assistant City Counselor."

11/5/1913

And afterwards, to-wit on Saturday, the 8th day of November, 1913, and at said September Term, 1913, of said Circuit Court, the court overruled said Motion to Require Appellants to give Additional Appeal Bond, so filed by Kansas City, Missouri in said cause; and to which ruling and action of the court in overruling said motion, Kansas City, Missouri, by its counsel then and there duly excepted.

And thereupon the court granted and allowed Kansas City, Missouri, until on or before the 10th day of January, 1914, within which time to file its Bill of Exceptions in said cause.

And afterwards, and on the same day, to-wit: on Saturday, the 8th day of November, 1913, and at said September Term, 1913, of said Circuit Court, the defendant Kansas City Stock Yards Company of Missouri, filed its Appeal Bond, which was duly approved by said court—in the words and figures following:

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"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 60282.

In the Matter of the Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street.

Bond for Appeal of the Kansas City Stock Yards Company of Missouri.

We, the undersigned, The Kansas City Stock Yards Company of Missouri, a corporation, as principal, and United States Fidelity & Guaranty Company, a corporation, as surety, acknowledge ourselves indebted unto Kansas City in the sum of One Thousand ($1,000.00) Dollars, for the payment of which sum well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is such that,

Whereas, said The Kansas City Stock Yards Company of Missouri has appealed to the Supreme Court of Missouri from the judg-
246 ment of the Circuit Court of Jackson County, Missouri, entered in the above entitled cause in favor of plaintiff and against defendant.

Now, if said appellant shall prosecute its appeal with due diligence to a decision in said Supreme Court, and shall pay all costs which may be awarded against it by any appellate court, then this obligation to be void; otherwise to remain in full force and effect.

Witness our hands this 24th day of October, 1913.

THE KANSAS CITY STOCK YARDS COMPANY OF MISSOURI.

(Signed) By COWHERD, INGRAHAM, DURHAM & MORSE, *Attorneys.*

UNITED STATES FIDELITY & GUARANTY COMPANY.

(Signed) By J. L. CROSS, *Attorney in Fact.*"

[Seal United States Fidelity & Guaranty Company. Incorporated 1896.]

And afterwards, and on the same day, to-wit: on Saturday, the 8th day of November, 1913, and at said September Term, 1913 of said Circuit Court, the defendant, State Line Improvement Company, filed its Appeal Bond—which was duly approved by said court—in the words and figures following:

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"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 60282.

In the Matter of the Condemnation Proceedings for Widening Sixth Street from Broadway to Bluff Street.

Bond for Appeal of State Line Improvement Company.

We, the undersigned, State Line Improvement Company, a corporation, as principal, and United States Fidelity & Guaranty Company, a corporation, as surety, asknowledge ourselves indebted unto Kansas City in the sum of One Thousand ($1,000.00) Dollars, for the payment of which sum well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is such that,

Whereas, said State Line Improvement Company has appealed to the Supreme Court of Missouri from the judgment of the Circuit Court of Jackson County, Missouri, entered in the above entitled cause in favor of plaintiff and against defendant.

Now, if said appellant shall prosecute its appeal with due diligence to a decision in said Supreme Court, and shall pay all costs which may be awarded against it by any appellate court, then this
247 obligation to be void; otherwise to remain in full force and effect.

Witness our hands this 24th day of October, 1913.

STATE LINE IMPROVEMENT COMPANY.

(Signed) By COWHERD, INGRAHAM, DURHAM & MORSE, *Attorneys.*

UNITED STATES FIDELITY & GUARANTY COMPANY.

(Signed) By J. L. CROSS, *Attorney in Fact.*"

[Seal United States Fidelity & Guaranty Company, Incorporated 1896.]

And afterwards, to-wit: on Friday, the 12th day of December, 1913, and at the November Term, 1913, of said Circuit Court, the court, for good cause shown, extended the time of all defendants to file Bill of Exceptions in said cause until on or before the 2nd day of February, 1914.

And afterwards, to-wit: on Thursday, the 29th day of January, 1914, and at the January Term, 1914, of said Circuit Court, the court, for good cause shown, extended the time of all defendants to file Bill of Exceptions in said cause until on or before the 2nd day of March, 1914.

And afterwards, to-wit: on Wednesday, the 25th day of February, 1914, and at said January Term, 1914, of said Circuit Court, the

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court, for good cause shown, extended the time of all defendants to file Bill of Exceptions in said cause until on or before the 1st day of April, 1914.

And afterwards, to-wit, *in* April 1st, 1914, and during the March, 1914, term of said court, the court for good cause shown, extended the time of all defendants to file Bill of Exceptions until on or before April 8th, 1913.

And afterwards, to-wit, on April 1st, 1914, and during the March Term, 1914, of said court, the court, for good cause shown, extended the time of all defendants to file Bill of Exceptions until on or before April 13, 1914.

Wherefore, the said defendants, St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Burlington & Quincy Railway Company, Hannibal & St. Joseph Railway Company, Kansas City, St. Joseph & Council Bluffs Railroad Company, Federal Investment Company, Union Depot Bridge and Terminal Railroad Company, The Chicago, Rock Island and Pacific Railway Company, Union Pacific Railroad Com-
248 pany, St. Louis & San Francisco Railroad Company, Kansas City Stock Yards Company of Missouri, State Line Improvement Company, Edgewater Terminal Railway Company, The Missouri Pacific Railway Company, Kansas City, St. Louis & Chicago Railroad Company and the Chicago & Alton Railroad Company, severally, pray the court to settle this their Bill of Exceptions to all and singular the acts, rulings and orders of said court in the premises, and that the same may be signed, sealed and made a part of the record herein, which is accordingly done.

Given under the hand and seal of the Honorable Thomas J. Seehorn, Judge of Division No. 3 of said Circuit Court, before whom the said proceedings were had, this 13th day of April, 1914.

T. J. SEEHORN, [SEAL.]
Judge of the Circuit Court of Jackson County, Missouri, at Kansas City, Division No. 3.
JAMES R. PAGE,
Special Judge of said Court, Presiding.

Appellants in due time and pursuant to the Statutes and the rules of court filed certified copy of the judgment and orders allowing their appeals in this cause in this court and same is now here pending.

Respectfully submitted,
WHITE & LYONS,
WARNER, DEAN, McLEOD & LANGWORTHY,
SEBREE, CONRAD & WENDORFF,
BALL & RYLAND,
KENNETH McD. DE WEESE,
WATSON, WATSON & ALFORD,
COWHERD, INGRAHAM, DURHAM & MORSE,
SCARRITT, SCARRITT, JONES & MILLER,
Attorneys for Appellant.

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249 In the Supreme Court of Missouri, in Banc.

Number —.

In the Matter of the Supplemental Proceedings to Open and Widen Sixth Street from Bluff Street to Broadway in Kansas City, Missouri, under Ordinance No. 7539, Entitled, "An Ordinance Providing for and Authorizing and Directing the Institution and Maintaining of Supplemental Proceedings to Properly Assess Benefits Against Certain Pieces and Parcels of Land within the Benefit District Prescribed by Ordinance No. 3209, Approved October 19, 1909."

KANSAS CITY, Respondent,

vs.

ST. LOUIS & KANSAS CITY LAND COMPANY, CHICAGO, BURLINGTON & Quincy Railroad Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Union Depot Bridge & Terminal Railroad Company, Edgewater Terminal Railway Company, Missouri Pacific Railway Company, Federal Investment Company, Kansas City, St. Louis & Chicago Railroad Company, The Chicago & Alton Railroad Company, State Line Improvement Company, Kansas City Stock Yards Company and St. Louis & San Francisco Railroad Company, Appellants.

Additional Abstract of Record on Behalf of Union Depot Bridge and Terminal Railroad Company.

SATURDAY, September 13th, 1913, 9:30 A. M.

On Saturday, the 13th day of September, 1913, at 9:30 o'clock A. M., and at the September term, 1913, at said Circuit
250 Court, the hearing of this cause was resumed and the following further proceedings had, to-wit: * * *

Mr. Small: I want to show that the City was a par-y, and the whole thing. I offer this much of this final decree in these cases, decided by the District Court of the United States on November 9th, 1912, in the case of Louis F. Swift et al., Complainants, against the Union Depot Bridge & Terminal Railroad Company et al., Defendants, No. 2793, in Equity. It is admitted that this decree was entered in all of those cases.

Mr. Lee: We object to the offer of any further testimony at this time, Your Honor.

Mr. Small: We offer that to prove up our allegation.

The Court: You offer it in support of your motion?

Mr. Small: Yes, sir; that we are the owners of that land.

Mr. Lee: The City objects to the introduction of any testimony at this time, of any sort, and we further object for the reason that this decree does not tend to prove any of the allegations set forth in the motion for a new trial, and does not tend to sustain or deny any of the contentions raised by the motion for a new trial, and for

the further reason that that is a matter in the decree which is irrelevant and immaterial to the issues in this case, and it tends to raise no issues not brought out at the trial of the case.

The Court: The objection will be overruled.

251 Mr. Small: Well, then, we will just consider that in evidence.

(Said decree was marked Exhibit "1," for identification.)

Said decree so offered in evidence is in words and figures as follows, to-wit (omitting caption):

Final Decree.

These causes, having heretofore been consolidated, came on for final hearing upon the pleadings and the evidence, this 9th day of November, 1912. Louis F. Swift and J. Ogden Armour, Parkside Land Company and F. W. Fratt, Receiver, appeared by Frank Hagerman, their counsel; Union Depot Bridge & Terminal Railroad Company and Guinotte Land Company by Kenneth M. De Weese, their counsel; Jackson County, Missouri, by Frank P. Sebree, its counsel; Kansas City, Missouri, by Andrew F. Evans, its counsel; Kansas City Missouri Gas Company and Porter S. Marquis, by Gage, Ladd, & Small, their counsel; William Vineyard, Emma Vineyard, Daisy B. Kellogg, Edward S. Kellogg, James F. Evans and Cameron L. Evans, by R. E. Ball, their counsel; George W. Mensing, Henry C. Mensing, William Mensing, Sarah J. Lynch, Mary E. Johnson, Avis T. Zumwalt (formerly Avis T. Johnson) and Anthony R. Mensing, by Cowherd, Ingraham, Durham & Morse and Frank Gordon, their counsel; Philip Sheridan Brown as executor of Martha E. McGee, by George H. English and John T. Harding, his counsel. The court being fully advised in

252 the premises, orders, adjudges and decrees:

1. The land involved in these cases is in Kansas City, Jackson County, Missouri, includes all that set forth in the pleadings, and covers the entire interest of all the parties to these cases in all the land bounded upon the north by the Missouri river and the harbor line thereof, upon the south by the north line of Front street as laid out by recorded plat, upon the west by the west line of Block A in Old Town Reservation extended to the said river and harbor line, and upon the east by the west line of lot 64 of the addition called "Hurck's Subdivision of the Lands of Joseph Guinotte adjoining the City of Kansas" extended to the north line of the Kansas City Southern railway tracks, and thence normal to said harbor line of said river.

2. The land described in paragraph 1 hereof consists of these three parcels:

(*a*) Parcel 1 contains so much of said land as lies west of the section line between sections thirty-two (32) and thirty-three (33), township fifty (50) north, range thirty-three (33) west, extended from Front street to the Missouri river and to its harbor line. This parcel of land constitutes and includes that which is the subject

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of litigation in above entitled causes numbered 2793, 2898, 3071, 3106 and 3560, and the title thereto is vested and quieted in F. W. Fratt as receiver of the Union Depot Bridge and Terminal Railroad Company, free from all right, title, interest and claim of all the parties to said causes, who are hereby barred of any
253 interest so that the said Fratt as receiver shall take such title as fully, completely and effectually as if conveyance thereof had been made to him.

(*b*) Parcel 2 contains so much of said land as lies east of said last mentioned section line north of the center line of the tracks of the Kansas City Southern Railway Company and west of the west line of lot sixty-seven (67) in Hurck's Subdivision of the Lands of Joseph Guinotte adjoining the City of Kansas." This parcel of land constitutes and includes that which is the subject of litigation in above entitled causes numbered 2794, 2899, 3107 and 3561, and the title thereto is vested and quieted in F. W. Fratt as receiver of the Guinotte Land Company, free from all right, title, interest and claim of all the parties to said causes, who are hereby barred of any such interest, so that the said Fratt as receiver shall take such title as fully, completely and effectually as if conveyance thereof had been made to him.

(*c*) Parcel 3 contains so much of said land as lies east of said section line so extended, and south of the center line of the tracks of the Kansas City Southern Railway Company and west of the west line of lot 64, and so much thereof as lies north of such center line between the west line of lot sixty-seven (67) and the west line of lot sixty-four (64) in the said subdivision of the lands of Joseph Guinotte, extended from the said center line of said tracks
254 normal to the Missouri river and to the harbor line of the river. These parcels of land constitute and include the land which is the subject of litigation in above entitled cause numbered 3029, and the title thereto is quieted and vested in the Parkside Land Company, free from all right, title, interest and claim of all parties to said cause, including Jackson County, Missouri, who are hereby barred of any such interest so that the Parkside Land Company shall take such title as fully, completely and effectually as if conveyance thereof had been made to it.

3. To all of foregoing parcels 1 and 2 the following named defendants disclaim any right, title and interest: George W. Mensing, Henry C. Mensing, William Mensing, Sarah J. Lynch, M. T. Lynch, Mary E. Johnson, Anthony R. Mensing and Avis T. Zumwalt (formerly Avis T. Johnson), so that each and all of said parties are barred and enjoined from ever making any claim thereto, they being hereby divested of same, fully and effectually, so that any title heretobefore held by them shall be and is hereby vested in F. W. Pratt, receiver as aforesaid. The interest of the said parties in and to parcel 3 has been settled, deeds made by them to the Parkside Land Company therefor, and a decree taken in the Circuit Court of Jackson County, Missouri, quieting their title, so that it is unnecessary to here deal further therewith.

4. Jackson County, Missouri is hereby divested of all right, title

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and interest in and to any of the land contained in said par-
255 cels 1, 2 and 3. By interlocutory decree of June 3, 1912, all its right, title and interest in parcels 1 and 2 were heretofore vested and quieted in F. W. Pratt, receiver, and its right, title and interest in parcel 3 were vested and quieted in the Parkside Land Company. Pursuant to the terms of said decree, said county has made, executed and delivered deeds therein called for, and received payments of the sums to which it was thereby entitled. Said interlocutory decree is adopted and confirmed as part of this final decree, the same as if fully written herein.

5. Kansas City, Missouri, is likewise divested of any and all interest in or to any of said land. All its right, title and interest in parcels 1 and 2 are quieted and vested in F. W. Pratt, receiver, and in Parcel 3 are quieted and vested in the Parkside Land Company.

6. A contract confirmed by ordinance No. 9698, approved by the Mayor on the 16th day of August, 1911, was heretofore entered into, reading as follows:

"In the United States Circuit Court for the Western District of Missouri, Western Division.

No. 2793.

Louis F. Swift, J. Ogden Armour, Complainants,
vs.
Union Depot Bridge & Terminal Railroad Company et al., Defendants.

No. 2794.

Louis F. Swift and J. Ogden Armour, Complainants,
vs.
Union Depot Bridge & Terminal Railroad Company et al., Defendants.

256 No. 2898.

County of Jackson, Complainant,
vs.
Louis F. Swift et al., Defendants.

No. 2899.

County of Jackson, Complainant,
vs.
Louis F. Swift et al., Defendants.

No. 3029.

Louis F. Swift et al., Complainants,
vs.
Kansas City, Missouri, Defendant.

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No. 3106.

FREDERICK W. FRATT, Receiver, et al., Complainants,
vs.
UNION DEPOT BRIDGE & TERMINAL RAILROAD COMPANY et al., Defendants.

No. 3107.

FREDERICK W. FRATT, Receiver, et al., Complainants,
vs.
UNION DEPOT BRIDGE & TERMINAL RAILROAD COMPANY, Defendants.

No. 3560.

KANSAS CITY, MISSOURI, Complainant,
vs.
LOUIS F. SWIFT et al., Defendants.

No. 3561.

KANSAS CITY, MISSOURI, Complainant,
vs.
LOUIS F. SWIFT et al., Defendants.

No. 3027.

EDWARD TILDEN, Complainant,
vs.
KANSAS CITY, Defendant.

No. —.

PARKSIDE LAND COMPANY, Complainant,
vs.
KANSAS CITY et al., Defendants.

Stipulation.

Subject to the approval of the Common Council of Kansas City, Missouri, and this court, it is stipulated between the parties hereto as follows:

257 1. J. Ogden Armour, Louis F. Swift, Union Depot Bridge & Terminal Railroad Company, the Guinotte Land Company, Frederick W. Fratt, Receiver of each of said companies, and the Parkside Land Company, agree that the sewers across the land involved in this litigation located in Lydia Avenue and Salisbury Street shall be united, completed and continued to the Missouri River, and the sewer now located in Gillis Street shall also be continued and completed to the Missouri River; all of said work to be done according to plans and specifications to be approved by the Board of Pub-

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lic Works. All of the cost of said work north of the north line of Front Street shall be borne by said Union Depot Bridge & Terminal Railroad Company, Guinotte Land Company, Frederick W. Fratt, Receiver, and Parkside Land Company. Costs south of said line of Front Street to be borne by the City or a sewer district or sewer districts now existing or hereafter to be created.

2. J. Ogden Armour, Louis F. Swift, Union Depot, Bridge & Terminal Railroad Company and Frederick W. Fratt, Receiver of Union Depot Bridge & Terminal Railway Company, agree to convey for use as a widening of Grand Avenue all their right, title and interest in the following described land, free of all incumbrances by them of every kind and character, to-wit: All of the land in and north of Block A, Old Town Reserve, according to the recorded plat thereof, lying west of a straight line drawn from the southeast corner of Grand Avenue and Front Street to the southwest corner of a tract of land on the Missouri River bank immediately east of
258 Grand Avenue (if extended) conveyed to and now used by the Metropolitan Street Railway Company as a pumping station.

3. J. Ogden Armour, Louis F. Swift, Union Depot Bridge & Terminal Railroad Company and Frederick W. Fratt, its Receiver, Guinotte Land Company, and Frederick W. Fratt its Receiver, and Parkside Land Company, William Vineyard, Emma Vineyard, Porter S. Marquis, Daisy B. Kellogg, Edward S. Kellogg, James F. Evans, Cameron L. Evans and Kansas City Missouri Gas Company agree.

(*a*) That Front Street as now laid out by recorded plat from Grand Avenue eastward to Park Avenue shall be hereafter recognized and treated by them as a public street of Kansas City, Missouri, for the full width of sixty (60) feet, and shall be adjudicated to be such by a decree of court hereafter to be entered.

(*b*) That Nicholson Avenue as now laid out by recorded plat from at or near Park Avenue eastward to about Scott Avenue shall be hereafter recognized by them as a public street of Kansas City, Missouri, for the full width of forty (40) feet, and shall be adjudicated to be such by a decree of court hereafter to be entered.

(*c*) To convey and dedicate to Kansas City their title and interest in a strip of ground sixty feet wide described as follows: Beginning at the south corner of Lot 64, Lands of Joseph Guinotte; thence southwesterly along the northwest line of Nicholson Avenue a distance of sixty feet; thence northwesterly on a line paral-el/ to the southwest side line of said Lot 64 extended, to the south
259 Harbor Line of the Missouri River; thence easterly along said Harbor Line to the southwest line of said Lot 64 extended; thence southeasterly along said southwest line of Lot 64 to the northwest line of Nicholson Avenue, said land to be used for the purposes of a public street in Kansas City, Missouri.

(*d*) To convey to Kansas City their title to and interest in a strip of land one hundred feet wide immediately adjacent to, beginning at and extending south from, the United States Harbor Line as now established and from the east line of Grand Avenue as extended to the eastern terminus of the present improved protection work at or

near the foot of Brooklyn Avenue if extended northward, for use by Kansas City for the location and establishment of warehouses, grain elevators and industries, public or private railroad tracks, public wharfs, or for street or levee purposes; provided, that in improving said strip of ground Kansas City shall always preserve, free and open, along the south side thereof, a thoroughfare for public travel from one end of said strip to the other. Said strip shall cross beneath the bridge of the U. D. B. & T. R. Co. by suitable subway only, built at the city's expense, and said subway shall not interfere with the use of the bridge or railroad tracks thereon, said company reserving a right of way 100 feet wide for said bridge.

(*e*) To convey to Kansas City their title to or interest in a strip of ground one hundred feet wide extending from the eastern end of the strip described in paragraph (*d*) of this section along the
260 south bank of the Missouri River to the strip of ground described in paragraph (*c*) of this section for uses similar to those specified in sub-section (*d*) of this paragraph. If, however, the bank of the river shall be hereafter advanced to the harbor line between the end of the present improved river protection work and the extended southwest line of Lot 64 of the lands of Joseph Guinotte, then Kansas City shall, in lieu of the land heretofore described in this sub-section, have and take full title to the strip of land one hundred feet wide beginning at the eastern terminus of the land described in section (*d*) of this section extended; thence eastward along and immediately south of the Harbor Line to the land mentioned in sub-section (*c*) of this section.

(*f*) The lands mentioned in sub-sections (*d*) and (*e*) of this section are hereby let to the Union Depot, Bridge & Terminal Railroad Company, its successors and assigns, subject to the right of said city to terminate said tenancy as hereinafter provided. The Company shall pay rent to the city at the rate of Five Dollars ($5.00) per month, in advance, beginning on the date of approval of this ordinance, and if the company shall become delinquent in the payment of such rent for thirty (30) days or more after demand made for payment thereof, the city may, by ordinance, terminate said tenancy. So long as rent shall be paid as herein fixed and provided the city shall not terminate said tenancy in whole or in part unless and until the leased land, or some part thereof, shall be required or actually needed for any of the uses and purposes specified in
261 sub-section (*d*) of this section, and the city council shall so declare by ordinance and so put the part needed to such use. The passage and approval of such ordinance shall be conclusive of the City's right to terminate said tenancy, but the right of occupancy of any part shall only be suspended during the time when the city is making such use of such part. Whenever the city for either of the causes mentioned shall enact an ordinance terminating the tenancy in whole or in part, then upon six months' written notice the Union Depot, Bridge & Terminal Railroad Company, its successors and assigns, shall, at its own expense, remove all of its property from the

land required to be vacated, and shall surrender peaceable possession thereof to the city.

4. J. Ogden Armour, Louis F. Swift, Union Depot Bridge & Terminal Railroad Company and Frederick W. Fratt, its Receiver, agree that Kansas City shall receive a right to municipally own and by itself or lessees to operate one or more ferry boats between any point in Kansas City, Missouri, on the south bank of the Missouri River and any public landing in Clay County, Missouri, or any private landing hereafter to be acquired by Kansas City, Missouri, freed from any objection by The Kansas City Ferry Company or any party hereto, said Ferry Company claiming an exclusive right of ferriage, and becoming a party to these causes and consenting to a decree to carry out the provisions of this paragraph.

5. Kansas City agrees that the persons and corporations named in Section 3 hereof shall have perfected by a decree herein
262 their title to the lands herein in controversy other than those specifically hereinbefore mentioned and expressly disclaims any and all right, title and interest to the lands other than those herein specifically described.

6. Each party to this controversy shall pay all the costs, fees and charges incurred by him or it and not heretofore paid by one or the other of the parties.

7. In the event of the approval of this stipulation by ordinance of the Common Council of Kansas City, Missouri, appropriate orders, judgments and decrees shall be entered in these causes to establish the titles and rights herein granted and to carry out the intent, meaning and purpose of this stipulation, and each party shall make and execute such deeds, assignments and conveyances as will reasonably carry out the agreement and be reasonably requested. Kansas City shall, upon reasonable request, pass such ordinances or adopt such resolutions as may be deemed necessary to perfect the title to the land to which it relinquishes its title, adopting, ratifying and approving all acts heretofore done or privileges exercised which directly or indirectly aided in making any land. If either party fails to comply with the provisions of this paragraph, the court may enforce the same by appropriate order, decree and process. If any other person asserts any right, title or interest in any of the property involved in this settlement, each party hereto will render such aid as may be reasonably requested in defeating the claim.

263 9. There is a controversy between the parties named in paragraph one, and the Kansas City, Missouri, Gas Company, William Vineyard, Emma Vineyard, Porter S. Marquis, Daisy B. Kellogg, Edward S. Kellogg, James F. Evans and Cameron L. Evans as to that portion of the property which lies between the government harbor line and Lot 11, in Block D, to Lot 11 in Block E, Old Town Reserve. The rights of these parties as to these controversies and as to what proportion, if any, of the sums paid for extending sewers should be refunded, and the extent of an assignment to be made of the rights acquired under paragraph (*f*), upon the

land within the space aforesaid shall be hereafter agreed upon between — or determined by the court.

The failure of the parties named in this paragraph to sign this agreement shall not annul it, but it shall be carried out as far as it practically can be by the other parties hereto with the interests they have.

UNION DEPOT BRIDGE & TERMINAL RAILROAD COMPANY,
By FREDERICK W. FRATT,
Receiver and President.
GUINOTTE LAND COMPANY,
By FREDERICK W. FRATT,
Receiver and President.
EDWARD TILDEN,
PARKSIDE LAND CO.,
J. OGDEN ARMOUR,
LOUIS F. SWIFT AND
F. W. FRATT, *Receiver,*
By FRANK HAGERMAN, *Their Solicitor.*
KANSAS CITY, MISSOURI,
By JOHN G. PARK,
CLYDE TAYLOR,
F. M. HAYWARD,
D. J. HAFF AND
E. C. MESERVEY,
Its Attorneys and Solicitors."

264 This contract is hereby approved. Porter S. Marquis and the Kansas City Missouri Gas Company, by and with the consent of the city, have agreed to become parties thereto and become bound thereby, by an endorsement written thereon in these words:

"Foregoing contract was executed with the hope and expectation that Porter S. Marquis and Kansas City Missouri Gas Company should become parties hereto. This they now do this — day of November, 1912.

PORTER S. MARQUIS.
KANSAS CITY, MISSOURI, GAS COMPANY,
By CHARLES E. SMALL, *Its Solicitor.*
KANSAS CITY, MISSOURI.
By A. F. EVANS AND
FRANCIS M. HAYWARD, *Its Solicitors.*"

By consent of the parties thereto, the said contract is hereby specifically enforced, each party thereto being hereby enjoined and decreed to carry out in all respects and fully perform the same.

7. Upon demand, each of the parties to causes numbered 2793, 2898, 3071, 3106, 3560 shall make deed to F. W. Fratt as receiver as aforesaid, of all his or its rights, title and interest in and to parcel No. 1, and all the parties to causes numbered 2794, 2899, 3107 and 3561 shall, upon demand, make like deeds to parcel No. 2, and in

case No. 3029 all the parties shall, upon demand, make like deeds to the Parkside Land Company. But, irrespective of the execution of any such deeds, said Fratt as receiver as aforesaid and the Parkside Land Company shall be vested with and own all the said in-
265 terest of the said parties in and to the land so directed to be upon demand conveyed, and this decree shall at all times be a muniment of title.

8. Out of the land thus, or in any other manner, acquired, vested and quieted, these conveyances shall be made:

(*a*) F. W. Fratt, as receiver, and as a commissioner of the court, shall convey to Kansas City Missouri, for street purposes, so much of parcel 1 as is in and north of Block A Old Town Reserve, and which lies west of a straight line drawn from the southeast corner of Grand avenue and Front street to the southwest corner of a tract of land on the Missouri river bank, immediately east of Grand avenue (if extended) conveyed to and now used by the Metropolitan Street Railway as a pumping station;

(*b*) F. W. Fratt, as receiver, and such commissioner, and the Parkside Land Company, shall join in a conveyance to Kansas City of their title and interest in a strip of ground sixty feet wide described as follows: Beginning at the south corner of Lot 64, Lands of Joseph Guinotte; thence southwesterly along the northwest line of Nicholson avenue a distance of sixty feet; thence northwesterly on a line parallel to the southwest side line of said lot 64 extended, to the south harbor line of the Missouri river; thence easterly along said harbor line to the southwest line of said Lot 64 extended; thence southeasterly along said southwest line of Lot 64 to the northwest line of Nicholson avenue, said land to be used for the purposes
266 of a public street in Kansas City, Missouri. And also in a strip of land one hundred feet wide immediately adjacent to, beginning at, and extending south from, the United States harbor line as now established, and from the east line of Grand avenue as extended to the eastern terminus of the present improved protection work at or near the foot of Brooklyn avenue if extended northward, for use by Kansas City for the location and establishment of warehouses, grain elevators and industries, public or private railroad tracks, public wharfs, or for street or levee purposes; provided, that in improving said strip of ground, Kansas City shall always preserve, free and open along the south side thereof a thoroughfare for public travel from one end of said strip to the other. Said strip shall cross beneath the bridge of the Union Depot Bridge & Terminal Railroad Company by suitable subway only, built at the city's expense, and said subway shall not interfere with the use of the bridge or railroad tracks thereon, said company reserving a right of way one hundred feet wide for said bridge.

(*c*) Also in a strip of land one hundred feet wide extending from the eastern terminus of the present improved work at or near the foot of Brooklyn avenue, if extended northward, along the south bank of the Missouri river to the strip of ground constituting the eastern boundary of the entire tract described in paragraph 1 hereof, for the uses described in subdivision (*b*) hereof. If, however, the bank of

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the river shall be hereafter advanced to the harbor line between the end of the present improved river protection work and the
267 extended southwest line of lot 64 of the lands of Joseph Guinotte, then Kansas City shall, in lieu of the land heretofore described in this subdivision, have and take full title to the strip of land one hundred feet wide beginning at the eastern terminus of the one hundred foot strip described in subdivision (*b*) hereof, thence eastward along and immediately south of the harbor line to the sixty foot strip mentioned in said subdivision. It is intended to grant to Kansas City for the purposes in this decree specified, the hundred foot strip of land along and immediately adjacent to the river from the eastern to the western boundaries of the land in controversy.

(*d*) These conveyances when made shall be and answer for those called for by the contract set forth in paragraph 6 hereof. But, irrespective of the making of said deeds, Kansas City is hereby vested with the title to said strips of land for the uses above set forth.

9. Front Street as shown by Plats 48 and 54 of Tuttle & Pike's Atlas of Kansas City (Edition 1907), from Grand avenue eastward to Park avenue, is now and shall hereafter be recognized and treated by the parties to these causes as a public street of Kansas City sixty feet in width. Nicholson avenue as shown by Plat 59 of Tuttle & Pike's Atlas of Kansas City (Edition 1907), from at or near Park avenue eastward to about Scott avenue, is now and shall by said parties to said contract and their assigns, be hereafter recognized as a public street of Kansas City forty feet in width. | Kansas City,
Missouri, upon acquiring title as aforesaid, shall lease, and it
268 is hereby decreed to be leased, to the Union Depot Bridge & Terminal Railroad Company, its successors and assigns, the strip of land mentioned in subdivision (*b*) of paragraph 8 hereof, upon these terms: Said company shall pay rent to the city at the rate of five dollars per month from the 16th day of August, 1911. Said rent has been paid up to the date of this decree and shall hereafter be paid in advance. If the company shall become delinquent in the payment of such rent for thirty days or more after demand made for the payment thereof, the city may, by ordinance, terminate said tenancy. So long as the rent shall be paid as herein provided, the city shall not terminate said tenancy in whole or in part unless and until the leased land or some part thereof shall be required or actually needed for any of the uses and purposes for which the land is hereby decreed to be conveyed to the city, and the city council shall so declare by ordinance and so put the part needed to such use. The passage and approval of such ordinance shall be conclusive of the city's right to terminate said tenancy, but the right of occupancy of any part shall be only suspended during the time when the city is making use of such part. Whenever the city for either of the causes mentioned shall enact an ordinance terminating the tenancy in whole or in part, then upon six months' written notice the Union Depot Bridge & Terminal Railroad Company, its successors and assigns, and all parties claiming under any of them shall, at its own expense, remove all of its property from the land

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required to be vacated, and shall surrender peaceable posses-
269 sion thereof to the city.] The Union Depot Bridge & Terminal Railroad Company may and shall sublet upon like terms, except that no rent is to be paid, to Porter S. Marquis and Kansas City, Missouri, Gas Company, each, the portions of said strip adjoining their lands respectively, conveyed to them as in paragraph 12 hereof provided, provided that the Kansas City Missouri Gas Company, its successors and assigns shall not be discriminated against by Kansas City in any use which said city may have the right to grant or permit others to make of said one hundred foot strip of land.

10. Kansas City Missouri has and shall have the right to municipally own and by itself or lessees to operate one or more ferry boats between any point in Kansas City, Missouri, on the south bank of the Missouri river, and any public landing in Clay County, Missouri, or any private landing hereafter acquired by Kansas City, freed from any objection by any party to these causes, or the Kansas City Ferry Company, which claims an exclusive right of ferriage. The Kansas City Ferry Company is now made a party hereto and appears by E. E. Ball, its solicitor, for the purpose of consenting to and being bound by this paragraph of this decree, and does consent and agree to be bound thereby.

11. Kansas City Missouri hereby abandons all claim of any right, title and interest in any of the land in controversy in any of these causes, save and except as it may be adjudicated and conveyed to it by this decree, and is enjoined, restrained and estopped by
270 record from ever making any claim for any part of any of the land in controversy excepting that so conveyed to it.

12. F. W. Fratt, receiver and commissioner as aforesaid, shall make these additional conveyances of the land held by him after making the conveyances aforesaid to Kansas City: (*a*) To the Union Depot Bridge & Terminal Railroad Company all that portion of parcel 1 not covered by the conveyances mentioned in subdivisions (*b*) and (*c*) of this paragraph; (*b*) to Porter S. Marquis so much of parcel 1 as is bounded on the south by the north line of Front street, on the west by the west line of lot 11, block D of Old Town Reserve, and said west line extended to the Missouri river, on the east by the east line of lot 2 in block E thereof and said east line extended to the Missouri river, and on the north by the Missouri river; (*c*) to the Kansas City Missouri Gas Company, so much of parcel 1 as is bounded on the south by the north line of Front street, on the east by the center line of Harrison street extended to the Missouri river, on the west by the east line of lot 2, block E of Old Town Reserve and said east line extended to the Missouri river, and on the north by the Missouri river; (*d*) to the Guinotte Land Company, all of parcel 2; (*e*) to the Parkside Land Company, all the land north of the center line of the tracks of the Kansas City Southern Railway Company lying between the west line of Lot 64 in Hurck's Subdivision to the lands of Joseph Guinotte adjoining the city of Kansas and the west line of Lot 67 therein extended normal

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to the harbor line of the Missouri River. The making of
271 the Missouri river the northern boundary as aforesaid, shall in no wise impair or lessen the effect of the title to be as aforesaid acquired by the city. But, irrespective of any such conveyance by said F. W. Fratt, receiver and commissioner, the title to each piece of land mentioned in this paragraph and ordered to be conveyed by him to said Union Depot Bridge and Terminal Railroad Company, Porter S. Marquis, Kansas City Missouri Gas Company, Guinotte Land Company and Parkside Land Company respectively, shall be and is hereby vested in each of said parties respectively to whom the conveyance is to be made, as against all the other parties to any and all suits mentioned in this decree, and said Union Depot Bridge and Terminal Railroad Company, Porter S. Marquis, Kansas City Missouri Gas Company, Guinotte Land Company and Parkside Land Company each is respectively adjudged and decreed to be the owner of said land so vested in it, free from any and all claims of any of the other parties to any of said suits, except as to the right and title of said Kansas City in said strips of land to be conveyed to it as set forth in paragraph 8 hereof.

13. The deeds mentioned in the pleadings from the Union Depot Bridge & Terminal Railroad Company and Guinotte Land Company were intended to secure debts also mentioned in the pleadings. There is due to Louis F. Swift and J. Ogden Armour from the Union Depot Bridge & Terminal Railroad Company the sum of One Million, Eighty-seven Thousand, Two Hundred and Sixty-eight and 48/100 dollars ($1,087,268.48), and from the Guinotte Land Company the sum of Forty-eight, Two Hundred and one and 81/100 dollars ($48,201.81). These sums are represented by notes described in the original bills in cases numbered 2793 and
272 2794 and are secured by the deeds of the company so owing the same, which were intended as mortgages, and are hereby charged as a lien on the land, to be, as herein provided, deeded to the debtor companies, but upon no other part of any of the land in controversy. Said sums shall be paid within twenty days, failing in which same may be enforced by special process against said property against which they are herein charged as a lien, and by general process against other property owned by the debtor. But upon filing said notes, duly canceled, with the clerk, the lien of said mortgages as so decreed shall be released.

14. The report of F. W. Fratt as receiver, this day filed herein, is hereby approved. Said receiver shall publish a notice once a week for four weeks in a newspaper published at Kansas City, Missouri, requiring all persons having claims against him to file the same herein within sixty days from this date. All such claims not filed within such time shall be barred. If no such claims be filed, the receiver without more shall stand discharged if and when he shall have made the conveyances herein required.

15. No costs heretofore paid or advanced by a party shall be recovered. Of the unpaid costs, the Kansas City Missouri Gas Company and Porter S. Marquis shall pay one-tenth (1/10), Kansas City Missouri one fourth (¼) and the Union Depot Bridge & Ter-

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minal Railroad Company, Guinotte Land Company and Parkside Land Company, the balance of said costs.

16. Jurisdiction is hereby reserved to make such orders as may be necessary to enforce and carry out the terms of this decree, to require the execution of deeds and the performance of the contract with the city mentioned in paragraph 6 hereof, and to con-
273 firm a clear title in the parties to whom conveyances shall be or are to be made.

ARBA S. VAN VALKENBURGH, *Judge.*

We consent to the entry of the foregoing decree.

FRANK HAGERMAN,
Solicitor for Louis F. Swift, J. Ogden Armour, Parkside Land Company.
KENNETH McC. DE WEESE,
Solicitor for Union Depot Bridge & Terminal Railroad Company, Guinotte Land Company.
WILLARD P. HALL,
H. S. JULIAN,
FRANK P. SEBREE,
Solicitor- for Jackson County, Missouri.
ANDREW F. EVANS,
City Counselor, and
FRANCIS M. HAYWARD,
Assistant City Counselor,
Solicitors for Kansas City, Missouri.
GAGE, LADD & SMALL,
Solicitors for Porter S. Marquis and Kansas City Missouri Gas Company.
R. E. BALL,
Solicitor for William Vineyard, Emma Vineyard, Daisy B. Kellogg, Edward S. Kellogg, James F. Evans, and Cameron L. Evans.

_____,
Solicitor for Philip Sheridan Brown, Executor.
E. E. BALL,
Solicitor for Kansas City Ferry Company.
F. W. FRATT, *Receiver.*

273*a* In the Supreme Court of Missouri.

No. 18080.

ST. LOUIS AND KANSAS CITY LAND COMPANY et al., Appellants,
vs.
KANSAS CITY, Respondent.

Stipulation.

It is hereby agreed that the appellants in the above entitled cause, in the Supreme Court of Missouri, filed therein, at the hearing of

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said cause, briefs in which the following assignments of error, contained on pages 10 and 11 thereof, were set out:

273b *Assignment of Errors.*

I.

The court erred in overruling the appellants' objection to the introduction of any evidence in this proceeding.

II.

The court erred in admitting in evidence Ordinance No. 3209, being the original condemnation ordinance.

III.

The court erred in admitting in evidence the so-called supplemental Ordinance No. 7539.

IV.

The court erred in refusing to the appellants the right granted by the State and Federal Constitutions and by the city charter to be heard upon the question of the amount of damages.

V.

The court erred in admitting incompetent and immaterial evidence offered by the city, and especially in admitting in evidence the amount of the award and verdict rendered in the municipal court in the original proceedings.

VI.

The court erred in excluding competent, relevant and material evidence offered by the appellants, and especially in excluding appellants' offer to show that the value of the property proposed to be taken and the amount of damages that would result from the proposed taking were far less than had been awarded in the municipal court.

273c

VII.

The court erred in giving to the jury at the request of the city instructions given, and in giving each of said instructions.

VIII.

The court erred in refusing each of the instructions asked by the appellants that were refused.

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IX.

The court erred in overruling the several motions of the appellants for a new trial and in overruling motion in arrest of judgment and in overruling each of said motions.

X.

The court by its rulings deprived appellants of their property without due process of law, in refusing to hear evidence upon the question of the value of the property taken or damaged, under Ordinance 3209 in violation of the 14th Amendment to the Constitution of the United States.

XI.

The court by its rulings denied to appellants the equal protection of the law in refusing to hear evidence of the value of the property taken or damaged under Ordinance 3209 in violation of the Fourteenth Amendment to the Constitution of the United States.

273*d* Also that the appellant, Union Depot, Bridge & Terminal Railroad Company, filed a separate brief in said cause, at the hearing thereof, in the Supreme Court of Missouri, in which the following assignments of error, contained on page 12 thereof, were set out:

273*e* *Assignment of Errors.*

1. The court erred in refusing to give instruction No. 1, as requested by appellant (Rec. pp. 222-223).

2. The court erred in not sustaining appellant's motion in arrest of judgment (Rec. pp. 226-227-236).

3. The court erred in overruling appellant's motion for a new trial and rehearing (Rec. 200-236).

4. The verdict of the jury is not responsive to the instructions as given by the court, and is in conflict with the law as declared by the instructions given by the court, and does not meet the requirements of the City Charter.

5. Because this proceeding deprives the appellant of its property without due process of law and denies to it the equal protection of the laws of the land within the meaning of Section 30 of Article 2 of the Constitution of Missouri, and of Section 1 of Article 14 of the Amendments to the Constitution of the United States of America.

273*f* That said assignments of error may be attached to the transcript of the record, now being prepared by the Clerk of

the Supreme Court of Missouri, to be sent to the Supreme Court of the United States.

Dated Kansas City, September 26th, 1914.

ST. LOUIS & KANSAS CITY LAND COMPANY,
UNION DEPOT, BRIDGE & TERMINAL RAILROAD CO. ET AL.,
Appellants.

By their Attorneys of Record,
I. M. WATSON,
R. E. BALL &
KENNETH Mc DE WEESE.
KANSAS CITY, *Respondent,*
By A. F. EVANS,
City Counselor, and
J. C. PETHERBRIDGE,
Assistant City Counselor,
Its Attorneys of Record.

[Endorsed:] No. 18080. St. Louis & Kansas City Land Co., et al., Appellants, vs. Kansas City, Defendants. Stipulation. Filed Sep. 28, 1914. J. D. Allen, Clerk.

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280 In the Supreme Court of Missouri, April Term, 1914. In Banc.

ST. LOUIS & KANSAS CITY LAND COMPANY et al., Plaintiffs in Error,
vs.
KANSAS CITY, MISSOURI, Defendant in Error.

And thereafter, to-wit, on May 7th, 1914, the following further proceedings were had and entered of record in the above entitled cause:

"In re Supplemental Proceedings under Ordinance of Kansas City No. 7539.

18080.

KANSAS CITY, MISSOURI, Respondent,
vs.
ST. LOUIS & KANSAS CITY LAND COMPANY et al., Appellants.

Come now the said parties, by attorneys, and after argument herein, submit this cause to the Court, with leave of ten days to said Appellants to file reply brief herein, and five days thereafter to said Respondent to file reply thereto."

281 In the Supreme Court of Missouri, April Term, 1914. In Banc.

ST. LOUIS & KANSAS CITY LAND COMPANY et al., Plaintiffs in Error,
vs.
KANSAS CITY, MISSOURI, Defendant in Error.

And thereafter, to-wit, on July 2nd, 1914, the following further proceedings were had and entered of record in the above entitled cause:

18080.

"KANSAS CITY, Respondent,
vs.
ST. LOUIS & KANSAS CITY LAND CO., CHICAGO, BURLINGTON & Quincy Railroad Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Union Depot Bridge & Terminal Railroad Company, Missouri Pacific Railway Company, Federal Investment Company, Kansas City, St. Louis & Chicago Railroad Company, The Chicago & Alton Railroad Company, State Line Improvement Company, Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company, Appellants.

Appeal from the Circuit Court of Jackson County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court being here now sufficiently advised

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of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellants its costs and charges herein expended, and have therefor execution. (Opinion filed.)"

Which said opinion is in words and figures as follows:

282 In the Supreme Court of Missouri, April Term, 1914. In Banc.

No. 18080.

KANSAS CITY, Respondent,
v.
ST. LOUIS AND KANSAS CITY LAND CO., CHICAGO, BURLINGTON AND Quincy Railroad Co., Chicago, Rock Island and Pacific Railway Co., Union Pacific Railroad Co., Union Depot Bridge and Terminal Railroad Co., Missouri Pacific Railway Co., Federal Investment Co., Kansas City, St. Louis and Chicago Railroad Co., The Chicago and Alton Railroad Co., State Line Improvement Co., Kansas City Stock Yards Co., and St. Louis and San Francisco Railroad Co., Appellants.

This is an appeal by corporate owners of property in Kansas City whose parcels were assessed to pay benefits to meet an award of damages to other persons whose property was taken or damaged in a proceeding to widen a street.

Kansas City in 1909 undertook to open and widen Sixth street from the east line of Bluff to the west line of Broadway by condemning forty feet of private property on the south side of the street—Sixth street leading from the bottoms up town and being the main travelled thoroughfare for heavy hauling between the two. The authority for this proceeding was ordinance No. 3209, and, as there are several ordinances in the record, we will call this the "original ordinance" passim. Under this original ordinance and in supposed compliance with charter provisions (Art. VI, 1908) condemnation proceedings were instituted in a court known as the "Municipal Court" and ripened into judgment whereby damages were awarded for the land taken in the rise of $165,000 and the same amount was assessed against the city and over 13,000 different tracts owned by individuals and corporations, lying within a benefit district prescribed by said original ordinance. No appeal from this judgment was taken either by any land owner whose property was condemned nor by any land owner whose property was assessed with benefits. On that judgment the city collected of those benefit assessments the rise of $89,000 to pay said award of damages. Presently, and with matters in this fix, a certain railroad company, the Union Pacific, discovered the service on owners whose par-
283 cels were subject to assessment of benefits was defective and brought its suit in equity in the circuit court of Jackson

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county against Kansas City and its officers, among them one Flynn. The life of the bill was injunctive relief in its favor (as an owner of property within the benefit district and which was assessed with benefits) against such assessment of benefits in the condemnation judgment under the original ordinance. Other parties in like fix (say, two or three) intervened. As there are several suits mentioned in this record, we will call this the "Flynn suit" to identify it. The Flynn suit ripened into a decree in favor of plaintiff and intervenors. It is sufficient to say of the Flynn suit that the condemnation judgment under the original ordinance was not assailed for lack of jurisdiction in the municipal court to hear any condemnation proceedings and assess any benefits to pay damages awarded therein. (a newly discovered theory, now pressed) but in substance that case proceeded on the theory that plaintiff had no notice of the proceeding and hence the judgment as to it was void. The chancellor found a lack of notice and process, (the order of publication required by the charter was not published a sufficient time) and that the several asssesments made against plaintiff's and intervenors' properties were void because of such lack of service. Hence the municipal court had acquired no jurisdiction of them. The scope and object of the decree in the Flynn case are indicated by the following excerpt:

"It is, therefore, considered, ordered, adjudged and decreed by the court, that said assessments, in so far as they effect (sic) or purport to effect (sic) plaintiffs or any of them or any of their several properties, be and the same are hereby annulled and for naught held; that the several assessments against the respective properties aforesaid of the plaintiffs and each of them be and the same are hereby set aside and annulled; the Defendant Kansas City, M. A. Flynn, City Clerk, U. L. Weary, Clerk of said Municipal Court, and the officers and agents of said City, be and they are each of them perpetually restrained and enjoined from making out, certifying or attesting any tax bills against the several properties of the plaintiffs or any of them under and by virtue of said assessments, and that plaintiffs have and recover from the defendant, Kansas City, the costs herein expended and have execution therefor."

Neither side took an appeal from the Flynn decree and it
284 remained operative as a perpetual injunction against collecting such unpaid assessments.

With things in this fix, it seems that Kansas City attempted to repeal the original ordinance presumably for the purpose of abandoning the proceeding and returning to those paying assessments the amounts so paid. But the city was reckoning without its host; for pending such repeal measure, another injunction suit was brought in the Jackson circuit court—this time against the city and in favor of those property owners whose lands had been condemned under the original ordinance and who had been awarded damages, to-wit, one Tuller and others. These new suitors, Tuller and others, took the position in their bill that on recognized equitable principles the city, under its charter, could not repeal the original ordinance and abandon such condemnation proceedings so far as those persons

were concerned whose property had been taken or damaged and to whom damages had been awarded by the judgment, where (as here) benefits had been assessed and in part paid, and where (as here) such property owners had appeared, tried out the issue as to them and recovered their damages, and where (as here) the judgment was not appealed from. We will call this case the "Tuller case" for convenience. This Tuller case also ripened into a decree whereby the city was, in effect, perpetually enjoined from repealing the original ordinance and abandoning the condemnation proceeding, and this decree also was unappealed from but remained operative as a perpetual injunction.

By the decrees in the Flynn and Tuller cases the city (to borrow the homely similitude of one of its briefs) was enjoined "fore and aft. It could neither go forward nor backward." In this peculiar condition it enacted an ordinance, No. 7539, which we will call the "supplemental or curative ordinance." The general object and purpose of this supplemental ordinance was to authorize a proceeding to assess and spread the balance of the benefit assessments (viz., those unpaid under proceedings on the original ordinance) over the non-paying properties in the benefit district. This supplemental ordinance was based on the authority of Sec. 23, Art. VI of the present charter of Kansas City and ran on the theory the unpaid benefit assessments were void. The charter provision in question, together with the supplemental ordinance will be found set forth in hæc varba in State ex rel. v. Seehorn, 246 No. 1. c. 549 et seq. (q. v.) and they will not be reproduced here. The object of said sensible
285 charter provision was to afford a remedy when by any error, defect or omission in condemnation proceedings, assessments made against private property *that* can not be enforced or collected or where property in the benefit district is omitted, etc. In such case it was provided that the city may by ordinance institute and carry on supplemental proceedings to make a proper assessment against any parcel of property in the benefit district erroneously omitted or erroneously made in the first proceeding, etc.

Presently under such supplemental and curative ordinance, a new proceeding was instituted in the municipal court to make a new assessment against such properties within the benefit assessment district as had not accepted the former judgment by payment. Proper charter notice was given and, among others, the present appellants, save one, appeared. The assessments left unpaid under the original proceeding on the original ordinance were spread by this new proceeding over the non-paying parcels in the benefit district, assessing to Kansas City her share, and the appellants here, save one, appealed from that judgment to the circuit court of Jackson county and the case was assigned to Judge Seehorn's division. In that court such proceedings were had that the case reached a stage of the trial where Judge Seehorn announced his determination to try out the question of the amount of damages awarded to property owners whose property was taken or damaged under the original proceeding as well as the question of assessing and spreading benefits over non-paying properties within the benefit district—his view being that the non-

paying property owners to be assessed with benefits were necessary parties to a proceeding awarding damages, hence a judgment void as to one was void as to the other; that to award damages and lay or spread assessments to pay them constitute an indivisible proceeding with two objects riding together.

The pleadings in this supplemental proceeding warranting such contentions, two prohibition suits were brought in this court to stop the trial in Judge Seehorn's court—one we will call the "Graham-Seehorn case"; the other, the "Tuller-Seehorn case." Preliminary rules in prohibition issued and those cases will be found reported in the 246 Mo. at pages 541 and 568 respectively.

So far as pertinent here, the Graham-Seehorn case held in judgment the main question: Had the charter court, known as
286 the "Municipal Court," any jurisdiction whatever of any condemnation proceedings. That question we answered in the affirmative by holding the court a constitutional repository of power in that behalf. In the Tuller-Seehorn case several questions were decided. One was that in supplemental or curative condemnation proceedings, brought in the municipal court under a supplemental ordinance, as here, an appeal would lie in favor of a property owner or any party interested to the circuit court. Another was that where such supplemental proceeding under such supplemental ordinance related only to making assessments on property against which an assessment was erroneously made in the original proceeding or was erroneously omitted to be made, as here, the jury should not include in their verdict the assessment of benefits and damages on property properly included in the first verdict—i. e., those properties taken or damaged the owners of which appeared at the first trial and acquiesced in the judgment, or those properties assessed with benefits the owners of which paid. But the scope of their verdict could not extend beyond the assessment of property so wrongfully made or omitted to be made. Another question decided was that the verdict and judgment in the original proceedings were valid and binding as to those who appeared and accepted them, and can not be taken either as interlocutory or as vacated because of an appeal in the supplemental proceedings to the circuit court. Another question decided was that Kansas City by its charter may through its common council repeal an ordinance for widening a street and thereby a judgment for compensation and benefits in a condemnation proceeding is made void; but that such repeal is, by charter provision, restricted to "any time before any of the parties assessed with benefits shall have paid the amounts so assessed"; that the charter provision providing that no assessments made in the original proceeding in widening a street "shall be affected or interfered with for the reason that any other assessment made in the same proceeding may be invalid in whole or in part" is the basis of the power given in the charter to the city by supplemental proceedings to subject only property omitted by mistake or illegally assessed to its proportional part of the costs of the improvement, and leaves the assessment of other property in the original proceeding either with damages or benefits stand as regular and not to be tried anew on an appeal in a supplemental pro-

ceeding absent an appeal from the judgment in the original proceeding, as here, and present a payment of benefits and an award of damages to persons appearing, as here. Other reasons based
287 on other charter reasons are given for that conclusion, and, among other things, it was held that the fact that a condemnation proceeding was an entirety and the fact that the damages and benefits must balance each other are no sufficient reasons for vacating the original judgment of the municipal court as to damages and benefits settled by it and acquiesced in, and are no sufficient reasons for a trial de novo of such particular matters on an appeal to the circuit court from a judgment in a supplemental proceeding. Another question decided in the Tuller-Seehorn case is thus correctly epitomized in the eighth syllabus:

"Property owners in the benefit district whose property is not taken but which will be charged with its share of the damages to be paid for the property taken for the street, are not necessary parties to the issue of the value of the property to be taken for the street; nor is it a denial of due process of law to deny to them a day in court to aid in preventing an unduly high valuation of the property to be taken, whose value in the end must be assessed against their property. The necessary parties are the city as plaintiff and the owners of the property to be taken as defendants; though, as a matter of grace, the owners of other property in the benefit district may be permitted to aid in preventing a too high valuation."

Accordingly in the Tuller-Seehorn case our writ issued and the circuit court of Jackson county was prohibited from trying the question of the amount of damages awarded to those property owners whose property was taken or damaged by the widening of Sixth street under the original unappealed-from judgment.

Accordingly in the Graham-Seehorn case we denied a writ of prohibition.

When our judgments went down in those prohibition cases, the circuit court of Jackson county resumed the trial of the appeal from the judgment of the municipal court in the supplemental proceeding at the point the trial was arrested by our preliminary rules in prohibition, proceeding to verdict and judgment in those particulars in line with our pronouncements in the prohibition cases, the verdict assessing part of the damages against the city, and part against the non-paying parcels of property in the benefit district including appellants' parcels.

Of the 13,000 tracts involved in the assessments of benefits, an aggregation of only thirteen corporate defendants appeal on due steps on a joint bill of exceptions. There is an appellant, the Union Depot Bridge and Terminal Railroad Co., that joins in ques-
288 tions raised by its coappellants but also raises questions singular to itself. Those questions will be considered separately.

What we have to say in determining this appeal may be put under the following heads:

(1) Questions determined in the Tuller-Seehorn and Graham-Seehorn cases.

(2) New questions arising at the trial after our judgments in

those two prohibition cases went down (and herein of those left open).

(3) Questions singular to the appeal of the Union Depot etc. Co. Of these seriatim.

I.

Of Questions Determined in the Tuller-Seehorn and Graham-Seehorn Cases.

Broadly, and as a main proposition, it is contended by appellants' aggregation of veteran counsel that we determined nothing correctly in those two cases. Therefore nothing was set at rest and every question there involved must be reagitated and redetermined. To that end we are cited to the same authorities relied on to sustain the selfsame propositions advanced in briefs in those cases and ruled adversely. It must be apparent that if there was a general rule allowing two hearings on the same questions it would be a blazing infirmity in the law. If courts put themselves in a limbo of nonsense and set themselves continuously to planting and then pulling up, weaving and then ravelling (vide the classical legend of Penelope's web) to stitching and then ripping, or, what amounts to the same thing, to deciding and then setting aside their own solemn adjudications, men and their posterity would think ill of our understanding. The doctrines of the law of the case are related to stare decisis and res adjudicata and are the settled doctrines of this court—doctrines having their exceptions in emergencies, but none of those exceptions apply here. There would be no end to litigation and no certainty in the law unless we adhered rigidly to the general rule of the law of the case and applied the exception to that general rule with rare circumspection and only when a palpable wound had been inadvertently given to justice and where no injury would result from a change in our judgments. In the named prohibition cases we halted the trial below on the prayer of these appellants. Why so? To settle vital questions of jurisdiction they deemed necessary to a just hearing. We did settle*d* them on full consideration and the trial judge resumed the trial at the point he was arrested and thereafter proceeded with it in conformity with our rulings. Delay has
289 occurred in a matter of pressing public moment and outlays have been made on the strength of our rulings. We deem it in the nature of a scandal to the administration of the law to undo at this late day what we have done by treading back on our tracks and sending this proceeding out of court with a tangle of confusion left behind and to the detriment of a great city unless we are forced to do so by the imperious call of the law itself. We hear no such call. We see no such necessity. The stiff general rule is that the lower court was bound by our former decisions and so are we on second appeal. Gracey v. St. Louis, 221 Mo. l. c. 5 et seq. and cases cited. We apply that rule.

(*a*) It is argued on behalf of appellants, in effect, that the municipal court in which the proceeding originated is not a constitutional court for the purpose of condemning property but that, under that

instrument, exclusive jurisdiction rested in the circuit court. The industry of counsel (who, indeed, left no stone unturned) in pursuit of authority has been unable to cite us to a single Missouri case sustaining them. There is an array of them running counter in theory. The constitution provides for a municipal court. It contains provisions authorizing the people of certain cities to frame their own charters governing themselves in municipal matters, and that they may alter and amend them.

In a line of great cases in this court on all fours, wherein appeared great lawyers to raise questions and elucidate contentions, it has uniformly been ruled that those charter provisions relating to the exercise of the right of eminent domain and the power to prescribe benefit districts, spread benefits over lots therein, pay damages for property condemned under the exercise of the right of eminent domain are one and all matters of purely municipal concern and are governed by charter provisions. As pointed out, in the Graham-See horn case it was ruled that jurisdiction was properly lodged in the municipal court. This conclusion was arrived at by considering the constitution, the charter and the pertinent general doctrine of a line of unshaken cases. Accordingly on the authority of the Graham-Seehorn case we disallow the point to appellants. In a somewhat similar case in New York, (Worthington v. London G. and A. Co., 164 N. Y. 81) where the question was whether a municipal court of the City of New York had jurisdiction, and where it had been ruled adversely by some inferior courts, Bartlett, J., (speaking to such decisions and for the court of appeals) used apposite language, viz:

290 "This decision has such a serious effect on the business interests of a great city containing about three millions and a half of inhabitants, that the question may well be asked whether a situation is not presented where the familiar rule of construction may be applied most rigidly, that a statute can be declared unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to and reconciliation has been found impossible, the statute will be upheld."

The rule invoked by the New York court to prevent a statute's perishing by construction is the trite doctrine of this court to be found in almost every volume of its reports.

Take this case, to illustrate the far-reaching effect of destroying the jurisdiction of the municipal court of Kansas City in opening and widening streets and spreading benefits over a district, thereby striking down all it has done and all its predecessor, the mayor's court, did in that city in such matters of emphatic municipal concern, led us in the Graham-Seehorn case by permissible rules of construction, to sustain the constitutional jurisdiction of the municipal court. We were glad to do that then and we are glad to stand by that ruling now. Stare decisis.

(*b*) It is argued on behalf of appellants who, it must be remembered, are not lot owners whose property was taken or damaged, but

are lot owners whose properties are assessed with benefits, that they were entitled to be heard as parties on the question of the amount of damages, that to deny them a hearing on that issue violates those constitutional provisions guaranteeing due process of law and equal protection of the law. But this contention (with a group of related ones we will not enumerate) was squarely held in judgment in the Tuller-Seehorn case and squarely decided against appellants. That case must be read with this, for we will not reformulate or reproduce its doctrines. Appellants had due process of law in the trial nisi on the question of benefits. They attempted to show there were none and took the verdict of the jury thereon and on the amount, if any. That question (benefits) relates to the power of taxation, while the part of the proceeding relating to the taking and damaging of property rests on another power, to-wit, the exercise of the sovereign power of eminent domain. They are distinct in quality
291 and are governed by different principles. We ruled in the Tuller-Seehorn case, in effect, that lot owners whose properties were subject to assessment in the benefit district were not necessary parties to that part of the proceeding in the sense that the validity of the judgment depended on notice to them; that as the parties whose properties were taken or damaged in the original proceeding appeared to the notice given and submitted to judgment, the amount of their damages became res adjudicata and were not open to further inquiry. The Tuller-Seehorn case stands on its own reasoning and on the authorities it cited and reviewed. We deem the question, therefore, foreclosed.

II.

Of New Questions Arising at the Trial After Our Judgment in the Prohibition Cases Went Down (and Herein of those Left Open).

(*a*) It is argued that the decree in the Flynn case was res adjudicata; that the effect of the ruling in that case was to make void the entire original proceeding, hence there was nothing to supplement by a supplemental proceeding. If appellants' premises were true their conclusion might be allowed as sound. But under our rulings in the prohibition cases, supra, the premises are not true, hence the conclusion is unsound. Hereinbefore we set forth the material part of the Flynn decree and therefrom it appears that certain assessments alone were made void. The decree was cautious and precise in that regard. Now, in our judgment in the Tuller-Seehorn case the original proceeding so far as the amount of damages for property taken was concerned and so far as the assessments of benefits on lots whose owners acquiesced in the decree and paid the benefits were concerned, was upheld. We but follow that ruling in disposing of the point in hand as we have done.

(*b*) It is argued by appellants that Sec. 23, Art. VI of the charter relating to supplemental proceedings to cure errors, defects and omissions in the original proceeding has no application to the case at bar. We disallow the contention. The charter provision and the supple-

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mental ordinance are set forth in full in the Graham-Seehorn case, (246 Mo. l. c. 549 et seq., q. v.). The charter provision is a sensible one. In carrying through condemnation proceedings errors and omissions, despite care and pains, are likely to arise, where, as here, there are a vast number of tracts and many tract owners involved, and such supplemental proceedings are provided for
292 in said charter provision, inter alia, "to properly assess against any piece or parcel of private property against which an assessment was in the first proceeding erroneously made or omitted to be made, the proper amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement etc." Certainly in the case at bar it is well within a proper use of English to say that the assessment of lots within the district owned by persons who repudiated the proceeding were erroneously made or were omitted to be made in a true sense. To rule as appellants ask us would crib and confine the charter provision to bounds too narrow to meet the mischiefs at which it was aimed. Our bounden duty is to construe it (if allowable in reason so to do) to meet those mischiefs and thus further its evident purpose. Accordingly the point is disallowed to appellants.

(c) It is further argued on their behalf that the original ordinance is void on its face for that it requires the amount allowed for private property taken to be wholly raised by special assessments against the property described in the benefit district. The point hinges on the fact that Sec. 3, Art. VI, of the charter directs there shall be assessed against the city the amount of benefits of the city and public generally, inclusive of any benefit to any property of the city, and that the balance, if any, be spread over the several tracts of private property in the benefit district. The original ordinance is unhandsomely worded but when due effect is given to all its words and its intendment is allowed to arise on the whole instrument, it will appear that the construction sought to be put upon them is unnecessarily harsh. A law ought not to be tortured so that a vice may appear by wringing it. The ordinance has the following provisions:

"And all private property within said limits is hereby taken and condemned for public use as a part of Sixth street and just compensation therefor shall be assessed, collected and paid, according to law. The amount allowed for private property taken, shall be wholly raised by special assessments made against the property described in the next succeeding section in accordance with Article VI of the charter of Kansas City, Missouri."

It will be observed it requires that compensation for condemned property "shall be assessed, collected and paid, according to law." It will also be observed that those assessments must be made "in accordance with Article VI of the charter of Kansas City, Mis-
293 souri." We do not think the validity of the supplemental proceedings breaks on the point made. This because:

(1) Counsel point us to no provision of the charter requiring the ordinance to make the quoted recitals and we have not been able to put our finger on one. The charter stands on its own

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legs and, in that regard, seems self-enforcing. It is full and explicit, leaving no room for doubt in the particulars in hand, and, as to them, does not seem to need the adventitious aid of any ordinance.

(2) Giving effect to all the ordinance words and construing them with the charter, to which the ordinance points for the law and for the rule of making assessments, its meaning is clear enough, to-wit, that the charter is to be followed.

(3) Moreover, that was the trial theory. The charter was followed. The city was assessed its charter share and not a particle of injury came to appellants because of the objectionable phrase.

(4) But more (and most of all) the instant proceeding, in those parts vitally affecting appellants, was under the supplemental ordinance, (246 Mo. l. c. 550 et seq.) and that ordinance pointed only to the charter and made a call on its provisions for the rules to govern the supplemental proceeding.

Accordingly the point is disallowed to appellants.

(*d*) Finally it is argued that the supplemental ordinance is void on its face because (we quote from appellants' "points and authorities"): "* * * this ordinance is vague, indefinite and uncertain in its terms and does not comply with said Section 23, which required the proceedings to be 'to properly assess against any piece or parcel of private property against which an assessment was in the first proceeding erroneously made or omitted to be made, the proper amount,' etc., and further that 'such supplemental proceedings shall be instituted and conducted as to the particular piece or pieces of private property sought to be acquired or assessed,' etc."

In the evolution of their argument under this head the order of publication to property owners is criticised for alleged equivalent vices. But it will be observed that the order of publication is wholly distinct from the ordinance and that the point made does not include that step in the proceeding directed to giving notice by order of publication. Appellants appeared to the order and tried their case on the merits. We do not say that where that is done a case might not be put where an objection might not be made at
294 the hearing to the order of publication. But we do say that an appearance and a trial on the merits leave parties in an uncommonly serious predicament in so far as objections to the form of the order are concerned. We think there is no substantial merit in this phase of the matter.

As we gather it appellants contend that the supplemental ordinance should have described by metes and bounds or some definite description each particular tract of the 13,000 erroneously omitted or erroneously assessed in the original proceeding. We do not think so. If we rule in that way as to the supplemental ordinance it would follow that the original ordinance should particularize by precision of description each separate tract in the benefit district. Why prescribe such an enormous publication descending into so many particularities in which a variation from the fact would breed a new crop of errors and omissions? The settled practice has been

not to descend to such particularity. Up to this time notice to the property owners generally in the described benefit district and defining the district, as here, have been sufficient to bring in interested parties. It was sufficient in this instance. They came in. Not one of them had any difficulty in finding where the shoe pinched him. Each knew the issue involved and directed its proof to that issue. So that while we have been informed and instructed by the ingenious refinement of the point, we have not been convinced it is sound.

(c) Some criticism is indulged on the instructions. It would swell this opinion beyond bounds to reproduce all of them, and thereby by ocular demonstration show that they did not conflict with each other but announced propositions of law agreeable to our rulings in the Graham-Seehorn and Tuller-Seehorn cases. We are of opinion appellants received favorable consideration at the hands of the court in instructions and that the verdict of the jury and judgment of the court ought not to be disturbed on that score.

III.

Of Questions Singular to the Union Depot Bridge and Terminal R. R. Co.

The Union Depot etc. Co. owned a small tract of land in the benefit district, was assessed a small benefit thereon in the original proceeding and paid the assessment. As we grasp it, it laid claim to shore land on the Missouri River in the benefit district. There were other claimants for this land, among them the city, and a suit was pending in the Federal court to determine and settle title.
295 Things were in this fix when the original condemnation proceeding was tried. We think it clear that no assessment whatever was made against this land by the original verdict and judgment. In the map filed with the original ordinance to initiate the original proceeding these disputed shore lands were marked "owned or claimed by the Union Depot Bridge and Terminal Railroad Co. and Kansas City, Missouri" endorsed across them. The record is not as plain as it might be and it is possible that different hypotheses might spring because of obscurity, but a study of it leads us to the conclusion these shore lands were omitted—doubtless owing to the fact that the ownership was in controversy. Between the time of the first verdict and judgment and the time of the supplemental proceedings a compromise was made in such Federal suit and by agreement between an aggregation of claimants certain tracts of these shore lands were given to appellant and certain parts respectively to other litigants, and a decree was entered in the Federal court vesting and quieting these respective titles. When the supplemental proceedings were brought to a head by verdict and judgment the several tracts of shore land awarded the present appellant by that decree were assessed with benefits—at first, in gross, but (subsequently by amended decree) the benefits were spread in a definite amount over each separate tract. It does not seem this

appellant appeared and took any part in the trial under the supplemental ordinance and proceeding. It had the same notice by publication all other tract owners had, but it chose the course of keeping in the background. When the verdict came in in the supplemental proceeding assessing its shore land tracts with benefits, it for the first time appeared and filed a motion for a new trial. In a nut shell it claims that the judgment in the first proceeding was res adjudicata on the question of its liability to assessment for these lands. This contention splits itself into branches. In the first place the hypothesis is indulged that the lands are covered by the assessment of benefits against the city in the original proceeding. Again, that they are covered by a clause in the original verdict to the effect that lots and parcels of land lying within the benefit district as prescribed by the ordinance "and not hereinbefore mentioned and described, we assess no benefits." If the latter view be taken then appellant confronts the proposition that the first verdict in that behalf was a nullity because of lack of notice. On the other hypothesis it is sufficient to say that the record does not bear out
296 the theory. Appellant came into the case late, and on a motion for a new trial. It filed no affidavit of newly discovered evidence. It brought to the attention of the court the Federal decree on that motion. That was not newly discovered, but we pass the point to let the matter ride off on its merits. We are of opinion that the land was erroneously omitted in the first assessment and that appellant ought not to complain over paying its share of the cost of the improvement with its co-appellants and all other property owners in the benefit district.

Other questions are raised we deem immaterial. There are a superabundance of briefs in the case, and, doing the best we can with the record, we are of opinion the judgment below was right and should be affirmed. It is so ordered.

All concur, except Woodson and Graves, JJ., who dissent for reasons stated in their dissent in State ex rel. Graham vs. Seehorn, 246 Mo. 541.

HENRY LAMM, *C. J.*

297 In the Supreme Court of Missouri, April Term, 1914, in Banc.

ST. LOUIS & KANSAS CITY LAND COMPANY et al., Plaintiffs in Error,

vs.

KANSAS CITY, MISSOURI, Defendant in Error.

And thereafter, to-wit, on July 11th, 1914, the following further proceedings were had and entered of record, in the above entitled cause:

18080.

"KANSAS CITY, MISSOURI, Respondent,

vs.

ST. LOUIS & KANSAS CITY LAND CO. et al., Appellants.

COMES now the Union Depot Bridge & Terminal Railroad Company, one of the appellants, by attorney, and files its separate mo-

tion for a rehearing herein. Come also the said appellants, by attorneys and file their motion for a rehearing herein."

298 In the Supreme Court of Missouri, April Term, 1914, in Banc.

ST. LOUIS & KANSAS CITY LAND CO. et al., Plaintiffs in Error,
vs.
KANSAS CITY, MISSOURI, Defendant in Error.

Thereafter, on July 14th, 1914, the following further proceedings were had and entered of record in the above entitled cause, to-wit:

18080.

"KANSAS CITY, Respondent,
vs.
ST. LOUIS & KANSAS CITY LAND CO. et al., Appellants.

Now at this day the Court having considered and fully understood the motion of the said appellants, and the separate motion of the Union Depot Bridge & Terminal Railway Company, an appellant, for a rehearing herein, doth order that said motions be and the same are hereby overruled."

299 In the Supreme Court of Missouri, in Vacation, in Banc.

Thereafter, to-wit, on August 14th, 1914, the following, among other proceedings, were had and entered of record:

18080.

"KANSAS CITY, MISSOURI, Respondent (Defendant in Error),
vs.
ST. LOUIS & KANSAS CITY LAND CO. et al., Appellants (Plaintiffs in Error).

Now at this day there is presented to the Honorable Henry Lamm, Chief Justice of the Supreme Court of Missouri, in Chambers, a petition for a writ of error to the Supreme Court of the United States, a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, an assignment of errors, and bond in the sum of twenty thousand dollars; which said writ of error is allowed, said assignment of errors filed, and said bond, to operate as a supersedeas, approved, order filed and made a part of the record herein."

And thereafter, to-wit, on September 7th, 1914, and in Vacation, the following further proceedings were had and entered of record in the above entitled cause:

18080.

"KANSAS CITY, MISSOURI, Respondent (Defendant in Error),
vs.
ST. LOUIS & KANSAS CITY LAND COMPANY et al., Appellants (Plaintiffs in Error).

Come now the said appellants (plaintiffs in error), by attorney, and file herein a citation, signed by Hon. Henry Lamm, Chief Justice of the Supreme Court of Missouri, directed to the said Respondent (defendant in error), citing and admonishing it to
300 be and appear before the Supreme Court of the United States at Washington, D. C., on the 30th day of September, 1914, to show cause, if any there be, why the judgment rendered against appellants (plaintiffs in error) should not be corrected."

And thereafter, to-wit, on September 23rd, 1914, the following further proceedings were had and entered of record in said cause:

18080.

"KANSAS CITY, MISSOURI, Respondent (Defendant in Error),
vs.
ST. LOUIS & KANSAS CITY LAND COMPANY et al., Appellants (Plaintiffs in Error).

Come now the said parties, by attorneys, and file herein their stipulation containing directions as to transcript of the record in this cause, to be filed with the Clerk of the Supreme Court of the United States."

301 In the Supreme Court of the State of Missouri.

No. 18080.

ST. LOUIS & KANSAS CITY LAND CO. et al., Appellants,
vs.
KANSAS CITY, Respondent.

Stipulation.

It is hereby stipulated and agreed, by and between the parties to the above entitled cause, that the Clerk of the Supreme Court of the State of Missouri need not copy in his transcript, to be sent up to the Supreme Court of the United States in the above entitled cause, the opinion of the Supreme Court of Missouri rendered in the case of State ex rel. Graham vs. Seehorn, 246 Mo. 541, and State ex rel. Tuller vs. Seehorn, 246 Mo. 568, and referred to by Chief Justice Lamm in the opinion rendered in this cause by the Supreme Court of the State of Missouri; but, it is further agreed that the opinions in said causes, and published in the 246th Mo., pages 541 and 568,

respectively, may be used on the hearing of this cause by either party, and may be considered by the Supreme Court of the United States, with the same force and effect as if the opinions had been copied in full in this transcript.

ST. LOUIS & KANSAS CITY LAND CO. ET AL.,
By I. N. WATSON, *Their Attorney.*
——— ———,
——— ———,
Attorneys for Appellants.
A. F. EVANS AND
J. C. PETHERBRIDGE.
Attorneys for Respondent.

[Endorsed:] Filed Sep. 23, 1914. J. D. Allen, Clerk.

302 In the Supreme Court of the State of Missouri.

No. 18080.

ST. LOUIS & KANSAS CITY LAND CO. et al., Appellants,
vs.
KANSAS CITY, Respondent.

Stipulation.

It is hereby stipulated and agreed, by and between the parties to the above entitled cause, that the Presiding Judge of the Supreme Court of the State of Missouri, who issued the writ of error in the above entitled cause, may make an order extending the time for filing a transcript of the record in this cause in the Supreme Court of the United States, by Plaintiff in Error and the Clerk of the Supreme Court of the State of Missouri, until on or before the 30th day of October, 1914.

ST. LOUIS & KANSAS CITY LAND CO. ET AL.,
By I. N. WATSON,
Their Attorney of Record.
——— ———,
——— ———,
Attorneys for Appellants.
A. F. EVANS AND
J. C. PETHERBRIDGE.
Attorneys for Respondent.

[Endorsed:] No. 18080. St. Louis & Kansas City Land Co., et al., Appellants, vs. Kansas City, Respondent. Stipulation. Filed Sep. 29, 1914. J. D. Allen, Clerk.

303 In the Supreme Court of the State of Missouri.

No. 18080.

ST. LOUIS & KANSAS CITY LAND CO. et al., Appellants,
vs.
KANSAS CITY, Respondent.

Order.

Now on this day the parties in the above entitled cause presented a stipulation agreeing that the time may be extended for filing a transcript in the Supreme Court of the United States on writ of error, until on or before October 30, 1914.

It is therefore ordered that the time heretofore given the Plaintiff in Error and Clerk of the Supreme Court of the State of Missouri for preparing and sending up a transcript of the record in the above entitled cause to the Supreme Court of the United States be extended until on or before the 30th day of October, 1914.

HENRY LAMM,
Presiding Judge Supreme Court of the State of Missouri.

[Endorsed:] No. 18080. St. Louis & Kansas City Land Co. et al., Appellants, vs. Kansas City, Respondent. Order. Filed Sep. 29, 1914. J. D. Allen, Clerk.

304 In the Supreme Court of Missouri, in Vacation, 1914.

STATE OF MISSOURI, *set:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the above and foregoing is a full, true and correct copy of all records and papers filed in this court, as called for by the stipulation filed in the case of Kansas City, Respondent (Defendant in Error) v. St. Louis & Kansas City Land Company, Appellants (Plaintiffs in Error), as the same appear of record and on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of our said Supreme Court. Done at my office in the City of Jefferson, State of Missouri, this 24th day of September, 1914.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk Supreme Court of Missouri.

Endorsed on cover: File No. 24,400. Missouri Supreme Court. Term No. 261. St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company et al., plaintiffs in error, vs. Kansas City. Filed October 16th, 1914. File No. 24,400.

Office Supreme Court, U. S.
FILED
MAY 11 1915
JAMES D. MAHER
CLERK

No. 261

In the

Supreme Court of the United States

October Term, 1914.

ST. LOUIS AND KANSAS CITY LAND COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, UNION DEPOT BRIDGE & TERMINAL RAILROAD COMPANY, EDGEWATER TERMINAL RAILWAY COMPANY, MISSOURI PACIFIC RAILWAY COMPANY, FEDERAL INVESTMENT COMPANY, KANSAS CITY, ST. LOUIS & CHICAGO RAILROAD COMPANY, THE CHICAGO & ALTON RAILROAD COMPANY, STATE LINE IMPROVEMENT COMPANY, KANSAS CITY STOCK YARDS COMPANY, AND ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, *Plaintiffs in Error,*

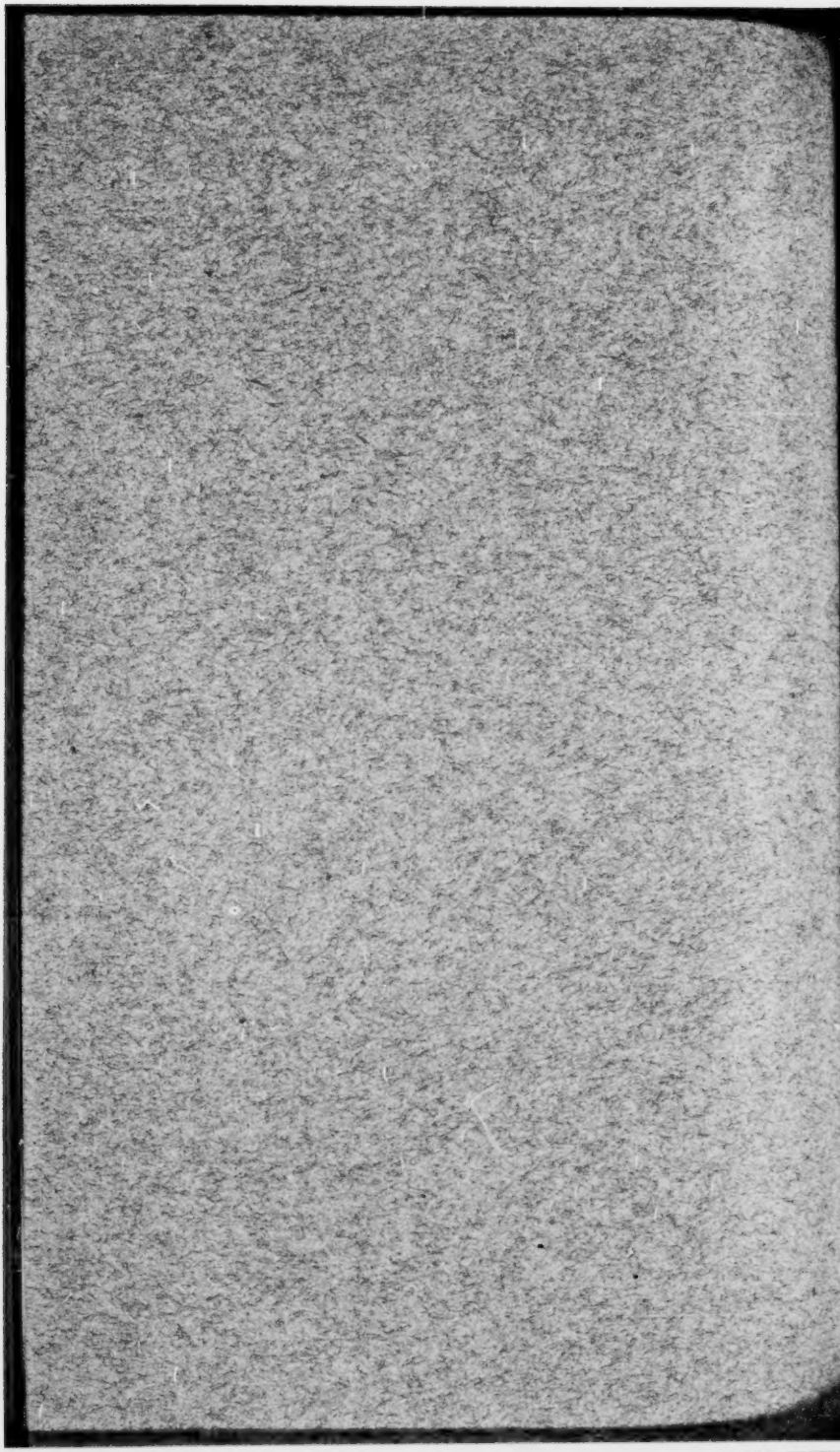
vs.

KANSAS CITY, *Defendant in Error.*

MOTION TO DISMISS WRIT OF ERROR OR AFFIRM JUDGMENT, AND STATEMENT OF FACTS.

ANDREW F. EVANS,
City Counselor of Kansas City, Missouri, and
ARTHUR F. SMITH and
JESSE C. PETHERBRIDGE,
Assistant City Counselors of Kansas City, Missouri,
Attorneys for Defendant in Error.

SMITH-GRIEVES LAW PRINTERS, KANSAS CITY, MO.



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In the

Supreme Court of the United States

October Term, 1914.

ST. LOUIS AND KANSAS CITY LAND COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, UNION DEPOT BRIDGE & TERMINAL RAILROAD COMPANY, EDGEWATER TERMINAL RAILWAY COMPANY, MISSOURI PACIFIC RAILWAY COMPANY, FEDERAL INVESTMENT COMPANY, KANSAS CITY, ST. LOUIS & CHICAGO RAILROAD COMPANY, THE CHICAGO & ALTON RAILROAD COMPANY, STATE LINE IMPROVEMENT COMPANY, KANSAS CITY STOCK YARDS COMPANY, AND ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, *Plaintiffs in Error*,

vs.

KANSAS CITY, *Defendant in Error*.

No. 656.

MOTION TO DISMISS WRIT OF ERROR.

Now comes Kansas City, the defendant in error, and appearing specially for the purpose of this motion only, moves the Court to dismiss the writ of error herein, for the following reason:

This Court is without jurisdiction to review the judgment of the Supreme Court of Missouri, contained in the record brought to this court, because there is no Federal question involved therein or presented by such record.

ANDREW F. EVANS,
City Counselor, and
ARTHUR F. SMITH and
JESSE C. PETHERBRIDGE,
Assistant City Counselors of Kansas City, Missouri,
Attorneys for Defendant in Error.

No. 656.
Supreme Court United States.
October Term, 1914.

St. Louis & Kansas City Land Company et al.,
Plaintiffs in Error.
vs.
Kansas City, Defendant in Error.

Motion to Affirm Judgment.

If the motion to dismiss the writ be not sustained, then the defendant in error moves the Court to affirm the judgment of the Supreme Court of Missouri in this cause, for the reasons that it is manifest from the record filed herein that the writ of error herein was sued out for delay only, and that the questions on which the decision of this cause depends are so frivolous as not to need further argument.

ANDREW F. EVANS,
City Counselor, and
ARTHUR F. SMITH and
JESSE C. PETHERBRIDGE,
Assistant City Counselors of Kansas City, Missouri,
Attorneys for Defendant in Error.

STATEMENT OF THE FACTS.

The following is sufficient of the record herein to present the facts upon which these motions are based, and to enable the Court to act understandingly in the premises:

Kansas City, Missouri, defendant in error, is a municipal corporation. Its governmental functions and powers are prescribed by a special charter adopted by its people, under the authority of the Constitution and Laws of Missouri. The courts take judicial notice of its charter provisions.

For the condemning of land for public purposes, the charter of Kansas City provides that an ordinance, such as No. 3209 hereinafter set out, be passed by the Common Council and approved by the Mayor, in which the land to be taken is described in one section; a benefit district is also prescribed and established by the same ordinance in another section, upon the lands within which, and against the city at large, is assessed the benefits to pay for the lands so condemned and taken. A proceeding is then filed in court and a jury of six freeholders of the city is empaneled to hear evidence and ascertain the amount of the award to be allowed for the land taken; the jury also assesses the benefits

against the city and on the land in the benefit district so prescribed in the proportions that the city at large and each tract of land is found by the jury to be specially benefited by the proposed improvement to pay for the land so taken. The verdict is confirmed by the Common Council of the city if the proceedings be tried in the municipal court, but if tried in the Jackson County Circuit Court, upon the motions for a new trial being overruled, the verdict is confirmed by the court, and judgment in each instance rendered thereon accordingly.

If, in the original proceedings, any tract of land has been wrongfully or erroneously assessed or omitted to be assessed, or other errors or defects therein have occurred, or assessments have been made which cannot be enforced or collected because of such errors or defects in the original proceedings, then the city may, under its charter powers (Sec. 23, Art. 6, hereinafter set forth) by ordinance institute, carry on and maintain *supplemental* proceedings to correct such errors, defects and omissions in the original proceedings. A proceeding on the supplemental ordinance is filed in court, notice thereof is given, a jury of six men is empaneled to re-assess the erroneous assessments aforesaid against the property erroneously assessed or omitted to be assessed in the oringinal proceeding, and the court and jury proceed to otherwise correct the errors in the original proceedings in ac-

cordance with Sec. 23 of Art. 6 of the City's Charter, and the ordinance passed in pursuance thereof. That was done in this case. Notice thereof was duly given and the plaintiffs in error here (except the Bridge Company) responded and took part in the trial of such supplemental proceedings.

In October, 1909, Kansas City, in the exercise of its municipal and charter powers, passed an ordinance, No. 3209, to widen a public street (called Sixth street) forty feet, by condemning the necessary land on the south side thereof for that purpose. Under this ordinance and the provisions of Article VI of its charter, relating to and authorizing the condemnation of private property for public use, the City instituted and conducted to final conclusion proceedings in its local court to acquire the necessary land for the widening of the street. In that proceeding $166,299.57 was awarded as damages for the land condemned and taken; to pay this award, there was assessed against Kansas City $3,238.39; the remainder was spread over a benefit district created and established by the ordinance for that purpose as special benefit assessments. This district contained about 13,000 different tracts of land. The verdict of the jury, or commissioners, was confirmed by the City Council, as provided by the City charter, and judgment entered thereon in the court. No appeal was taken from this proceeding. The City then proceeded in the way provided by its charter and the judgment of the court to collect the benefit assess-

ments to pay for the land so condemned, and had collected of the total assessments the sum of $89,-317.00 when the Union Pacific Railroad Company, one of the plaintiffs in error herein, against whose lands a benefit assessment had been levied, succeeded in permanently enjoining the City from collecting the assessment so made against its lands, on the ground that the publication of the notice of the pendency of the original proceeding had not been made for the length of time required by the City's charter; all further collections of the benefit assessments then stopped. There was then left $76,981.98 to be collected from about 5,000 different tracts of land owned by about as many different property owners in the benefit district, including plaintiffs in error, who had not as yet paid their assessments. The City then attempted to repeal the ordinance so that it might pay back the assessments so collected; but it was again permanently enjoined, at the instance of some of the property owners whose property had been condemned, from repealing the ordinance and taking such action. The City being thus enjoined both "fore and aft," it could neither go forward nor backward with the original proceedings.

Under these circumstances, the City, in the further exercise of its charter powers (Sec. 23 of Art. VII) relating to supplemental condemnation proceedings to cure and correct errors, defects or omissions in the original proceedings, in February, 1911, en-

acted a supplemental ordinance, No. 7539, authorizing supplemental proceedings to properly assess against any piece or parcel of private property within the benefit district prescribed in the original ordinance, against which an assessment was in the first proceedings wrongfully made or which was omitted to be made, and which assessments had not been paid and could not be enforced, the proper amount such private property, exclusive of the improvements, was benefited by the proposed improvement.

The following is a copy of the supplemental ordinance so enacted for the purposes mentioned:

Supplemental Ordinance No. 7539.

"An Ordinance

Providing for, authorizing and directing the institution, carrying on and maintaining of supplemental proceedings to properly assess benefits against certain pieces and parcels of land included within the benefit district prescribed by Ordinance No. 3209, *approved October* 19, 1909.

Whereas, the Common Council of Kansas City, Missouri, passed an ordinance entitled 'An Ordinance to open and widen Sixth street from the east line of Bluff street to the west line of Broadway and repealing Ordinance No. 1750,

entitled "An Ordinance to open and widen Sixth street from the east line of Bluff street to the west line of Broadway," approved July 14, 1909,' which said ordinance was numbered 3209 and was duly approved October 19, 1909, and

Whereas, proceedings were instituted under said ordinance in the Municipal Court of Kansas City to condemn the land in said ordinance described and a verdict was rendered in said Municipal Court, and

Whereas, by reason of certain errors, defects and omissions certain assessments were made against land in the benefit district prescribed by said ordinance which cannot be enforced or collected and certain pieces of private property in the benefit district were omitted and not assessed by said verdict, and

Whereas, in order to pay the total amount of damages awarded for land taken and damaged by said condemnation it was and is necessary and required that said certain pieces and parcels of land shall be assessed if they are deemed benefited by the jury.

Now, therefore, be it ordained by the common council of Kansas City:

Sec. 1. That the Mayor and City Counselor are hereby authorized and directed to institute, carry on and maintain supplemental proceedings to properly assess against any piece or parcel of private property within the benefit district prescribed in Ordinance No. 3209, approved October 19, 1909, against which an assessment was in the first proceeding wrongfully made or which was omitted to be made, the proper amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement, such amount to be determined by the verdict of a jury in such supplemental proceedings as provided by Article 6 of the Charter of Kansas City.

Sec. 2. Nothing in this ordinance contained shall be held to limit the scope of such supplemental proceedings, but such proceeding shall be deemed to be for the purposes authorized by Article 6 of the Charter of Kansas City.

Sec. 3. Such supplemental proceedings shall be begun in Division No. 1 of the Municipal Court of Kansas City and shall be known and described as supplemental proceedings for the purposes specified in said Ordinance numbered 3209.

Sec. 4. All ordinances or parts of ordinances in conflict with this ordinance are, in so far as they conflict with this ordinance, hereby repealed."

Section 23, Article 6, Kansas City Charter.

Sec. 23 of Art. 6 of the Kansas City Charter, the basis and authority for the supplemental ordinance numbered 7539, and the supplemental proceedings which were instituted thereunder and carried to conclusion, reads as follows:

"Sec. 23.—*Defective Proceedings—Supplemental.*—When by reason of any error, defect or omission in any proceedings, or in the verdict or judgment therein that may be instituted under the provisions of this Article, a portion of the private property sought to be taken, or some interest therein, cannot be acquired, or an assessment is made against private property which cannot be enforced or collected, or when, by reason of any such defect, private property in the benefit district is omitted, the City may, by ordinance, institute, carry on and maintain supplemental proceedings to acquire the right and title to such property or interest therein

intended to be taken by the first proceedings, but which cannot on account of such defect, error or omission, be acquired thereunder, or to properly assess against any piece or parcel of private property against which an assessment was in the first proceeding erroneously made or omitted to be made, the proper amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement to be determined by the verdict of the jury in such supplemental proceedings; and the original assessments may be revived, corrected, increased or diminished as may be necessary or equitable under the provisions of this Article for the original proceedings. Such supplemental proceedings shall be instituted and conducted as to the particular piece or pieces of private property sought to be acquired or assessed in like manner and with like effect as in the original proceedings, and shall be known and described as supplemental proceedings for the purposes specified in the original ordinance; and a supplemental verdict and assessment shall be made, confirmed and copies of the original verdict certified in every particular as in the original proceedings; and the assessments as established and corrected by such supplemental verdict shall be collected by the City Treasurer in the same manner and under like conditions and restrictions, powers and duties as in the case of original proceedings."

Original Ordinance No. 3209.

The following is a copy of original Ordinance No. 3209, under which the original proceedings were authorized and conducted to condemn the land for the widening of the street:

"An Ordinance

To open and widen Sixth street from the east line of Bluff street to the west line of Broadway and repealing Ordinance No. 1750, *entitled 'An Ordinance to open and widen Sixth street from the east line of Bluff street to the west line of Broadway,' Approved July* 14, 1909.

Be it ordained by the Common Council of Kansas City:

Section 1. That Sixth street from the east line of Bluff street to the west line of Broadway, be opened and widened, the boundary lines of which are more particularly described as follows, to-wit:

Beginning at a point on the west line of Broadway one hundred (100) feet south of the northwest corner of Sixth and Broadway; thence west one hundred (100) feet south of and parallel to the north line of Sixth street to the east line of Bluff street; thence northeastwardly along the east line of Bluff street to the southeast corner of Sixth street and Bluff street; thence east along the south line of Sixth street to the west line of Broadway, thence south to beginning.

And all private property within said limits is hereby taken and condemned for public use as a part of Sixth street and just compensation therefor shall be assessed, collected and paid, according to law. The amount allowed for private property taken, shall be wholly raised by special assessments made against the property described in the next succeeding section in accordance with Article VI of the Charter of Kansas City, Missouri.

Sec. 2. The Common Council determines and prescribes the limits within which private property shall be deemed benefited by the improvements herein proposed, and be assessed and

charged to pay compensation therefor, as follows, to-wit:

Beginning at the intersection of the center line of the main channel of the Missouri River with the State line between Missouri and Kansas, produced from the south; thence south along said State line and said State line produced, to the southwest corner of the northwest quarter (¼) of the northwest quarter (¼) of Section seven (7), Township forty-nine (49), Range thirty-three (33); thence east along the south line of said quarter, and said line produced, to the east line of Allen Avenue; thence to the southwest corner of lot two hundred and sixty-seven (267), block five (5), Resurvey of Whipple's Second Addition; thence to the southeast corner of lot one hundred and eighty-six (186) in said block; thence to the northwest corner of lot two hundred and thirty-nine (239), block two (2), in said addition; thence to the northwest corner of said lot; thence to the northwest corner of lot fifty-four (54) in said block; thence to the northeast corner of said lot fifty-four (54); thence to a point in the west line of Mercier Place, where it is intersected by the center line of Twentieth (20th) street, produced from the east; thence east along the center line of Twentieth (20th) street to the center line of Forest avenue north of Twentieth (20th) street; thence north along the center line of Forest avenue to the center of Independence avenue; thence east along the center line of Independence avenue to the center line of Forest avenue north of Independence avenue; thence north and northwardly along the center line of Forest avenue and said line produced to the center line of the main channel of the Missouri River; thence along the center line of the main channel of the Missouri River to the beginning.

> Sec. 3. Ordinance No. 1750, entitled 'An Ordinance to open and widen Sixth street from the east line of Bluff street to the west line of Broadway,' approved July 14, 1909, is hereby repealed, and all ordinances or parts of ordinances in conflict with this ordinance are, in so far as they so conflict, hereby repealed."

Under the supplemental ordinance and the authority conferred in Sec. 23 of Art. 6 of the Charter, as above set forth, Kansas City instituted proceedings to correct the errors, defects and omissions in the first verdict and proceedings, by spreading over the lands in the benefit district, so omitted from the first verdict, or wrongfully assessed therein, the balance of the uncollected assessments in the manner prescribed in the supplemental ordinance and Article 6 of the Kansas City Charter relating to such matters. *All of the plaintiffs in error were duly notified of the supplemental proceedings in the manner provided by the Charter for such proceedings, and they all appeared and contested excepting the Union Depot Bridge & Terminal Railroad Company* (hereinafter called the "Bridge Company" for brevity).

A trial of such supplemental proceedings was first had in Kansas City's Municipal Court as the ordinance provided. From the final confirmation and judgment in that court, certain of the plaintiffs in error here appealed the proceedings to the Circuit Court of Jackson County, Missouri, at Kansas City.

At the inception of the trial in the Circuit Court of Jackson County, Missouri, the trial judge announced that he would try the whole proceeding *de novo;* certain property owners whose land had

been taken in the original proceeding protested and asked time to go to the Supreme Court of Missouri and sue out a writ of prohibition to prevent the court from re-trying the issue as to the amount of damages allowed for the property taken in the original proceeding. That writ was granted. (*State ex rel. Tuller* v. *Seehorn, Judge*, 246 Mo. 568.) At the same time certain of the plaintiffs in error herein, who are owners of property in the benefit district, also made application to the Supreme Court of Missouri for a writ of prohibition, prohibiting the trial court from trying the case at all, which writ was denied. (*State ex rel. Graham* v. *Seehorn, Judge*, 246 Mo. 541.) Pending these proceedings for writs of prohibition in the Supreme Court, the trial court continued the proceedings. After the decisions in the above cases were rendered, and mandates handed down, the case came on for trial and the court proceeded to try the matter in accordance with the decision of the Supreme Court of Missouri in those cases. At the inception of the trial of the cause, Mr. I. N. Watson, attorney for the plaintiff in error the Union Pacific Railroad Company, and before the introduction of any testimony, interposed the following objection:

> "Mr. I. N. Watson: I want to make an objection to any proceeding under this supplemental proceeding, for the reason that the ordinance is not sufficient on its face, in that it does not specify any errors or defects sought to be remedied; that is, it does not point out or specify the errors or omissions which it is sought to be corrected by this proceeding; neither does it specify the property to be taken, or the property in the benefit district, but refers that question to

a prior ordinance; therefore, the ordinance, on the face of the proceedings, is not sufficient. The ordinance does not properly describe what pieces of property were omitted or failed to be assessed in the former proceedings, and it does not specifically point out what errors were in the former proceedings, but it simply states that it was made to correct errors and omissions in the former proceedings, without naming them. And, for the further reason, that a bill was brought in this court by the Union Pacific Railroad Company to enjoin the collection of any tax under that proceeding, the ordinance specified in the first proceeding. That proceeding was heard in this court on January 23, 1911; and the court adjudged the proceeding null and void for want of notice, and enjoined the City from collecting any assessment thereunder. That this proceeding is taking property without due process of law and the equal protection of the law, and we now ask, for the Union Pacific Railroad Company, for full protection of the Fourteenth Amendment of the Constitution of the United States, and of the Constitution of the State of Missouri; that if the City had complied with the charter provisions and given notice in the first instance, the Union Pacific Railroad Company would have had a right to contest the amount of damages awarded to the property owners in that first proceeding; yet, by reason of the fact that the City failed and neglected to comply with the charter provisions to give notice—notice to the Union Pacific Railroad Company, in the first instance—the Union Pacific Railroad Company is deprived of the right to be heard upon its share of the awards under the charter; and, in and by such proceedings, it permits the City to violate the provisions of the charter, and takes from this defendant the right to be heard on the question of damages in the first in-

stance, and have its protection in and by virtue of the Fourteenth Amendment of the Constitution of the United States; and the defendant, the Union Pacific Railroad Company, now invokes the protection of the Fourteenth Amendment of the Constitution of the United States against this supplemental proceeding, for the further reason that it deprives the Union Pacific Railroad Company of its property without due process of law, in this: That it has property within the benefit district and property to be assessed, and that in and by virtue of the original proceedings brought, before any damages is entitled to be awarded for property taken or benefits assessed against the Union Pacific Railroad Company, it is entitled to notice of such proceedings, and is entitled to have a hearing in court on the question of the amount of damages awarded for property taken and for which benefits are assessed against its property; and that by a judgment of this court, the original proceedings have been pronounced null and void for want of notice, as against the Union Pacific Railroad Company; and that thereby the court found that no notice was given to the Union Pacific Railroad Company as provided by the charter provisions of Kansas City—and that the Union Pacific Railroad Company never has had its day in court to be heard upon the question of damages which should be assessed for the property owners, and for which benefits are assessed against its property; and that in denying it such right to be heard, and such right to question the award, the court is taking defendant's property without due process of law, in violation of the Constitution of the State of Missouri, and also in violation of the Fourteenth Amendment of the Constitution of the United States; and defendant invokes both the provision of the Constitution of the State of Mis-

souri and the Fourteenth Amendment of the Constitution of the United States as its legal right from any assessment of benefits, until said Union Pacific Railway Company has had a chance and opportunity to be heard upon the amount of damages that shall be awarded to property owners and the benefits assessed against it—as provided by the charter of Kansas City, in the original proceedings.

The Court: Now, gentlemen, let it be understood that the attorneys will be permitted to indicate in the bill of exceptions any specific or particular section of the Constitution of the United States or the State of Missouri that they desire to include in the bill of exceptions.

Mr. Watson: I want to make the further objection to the introduction of any evidence under this supplemental ordinance—for the reason that the ordinance is so vague and indefinite that it does not describe any property which has been omitted in the original proceedings, as required by the charter—and that it is necessary that the specific pieces of property sought to be assessed with benefits should be set out and described in the supplemental ordinance in order to give this court or any court jurisdiction to hear and determine any proceedings thereunder."

This objection was adopted by all of the plaintiffs in error herein, excepting the Bridge Company, which did not appear at the trial of this cause nor until the matter came up on a motion for a new trial later on.

The foregoing objection was overruled by the trial court, and the trial proceeded to final conclusion, in which the property of the plaintiffs in error, within the benefit district, was assessed separately with the following amounts, separately, and separate judgments against the lands of each was rendered

and entered, to pay their proportionate share of the damages awarded for the property condemned and taken in the widening of the street, to-wit:

Federal Investment Company	$1,103.20
Union Pacific Railroad Company	2,960.81
St. Louis & Kansas City Land Company	907.76
Chicago, Burlington & Quincy Railroad Co.	62.01
Hannibal & St. Joseph Railway Company	200.63
Hannibal & St. Joseph Railway Company and Chicago, Burlington & Quincy Railway Company, combined, were assessed	2,574.54
Kansas City, St. Joseph & Council Bluffs Railroad Company	43.71
Kansas City, St. Louis & Chicago Railroad Company	16.16
Kansas City, St. Joseph & Council Bluffs Railway Company and Chicago, Burlington & Quincy Railway Company, combined, were assessed	2,484.49
Chicago, Rock Island & Pacific Railway Company	872.03
Union Depot Bridge & Terminal Railroad Company	4,086.31
The Missouri Pacific Railway Company	4,590.28
Kansas City Stock Yards Company of Missouri	4,728.24
Edgewater Terminal Railway Company	211.47
State Line Improvement Company	1,286.62
St. Louis & San Francisco Railroad Company	3,687.35
The Chicago & Alton Railroad Company, the Kansas City, St. Louis & Chicago Railroad Company, combined, were assessed	2,134.68

None of the property of any of the plaintiffs in error was condemned and taken in either the original or supplemental proceedings; but their property was assessed in the supplemental proceedings with

benefit assessments in the separate amounts hereinbefore set out, to pay, in part, for the land condemned and taken in the original proceedings for the widening of the street.

In the Circuit Court, in the supplemental proceedings, the uncollected benefits, which had been wrongfully or erroneously assessed in the original proceeding, were reassessed, a part of which was against the City, and the balance was spread over and assessed against the remainder of the tracts of land, separately, in the benefit district, which had been wrongfully or erroneously assessed, or was omitted to be assessed, in the original proceedings, and which assessments had not been paid, and could not be enforced, and separate judgments therefor rendered and entered against each tract, in accordance with the supplemental ordinance and the directions of the Supreme Court of Missouri in the Tuller and Graham cases, *supra*.

After the trial was over and the verdict had been rendered in the supplemental proceedings the plaintiff in error, the Bridge Company, appeared for the first time and filed a motion for a new trial and asked that such motion be sustained for the following reason, among others:

> "Because these proceedings deprive the movant of its property without due process of law and denies to it the equal protection of the laws within the meaning of Section Thirty, Article Two of the Constitution of Missouri, and of Section One, Article Fourteen of the Amendments of the Constitution of the United States."

Its motion and all motions for new trial were overruled, and the verdict of the jury confirmed by the court, in accordance with the provision of the Kansas City charter relating to such matters.

From the judgment rendered in the supplemental proceedings, as above set forth, plaintiffs in error herein appealed to the Supreme Court of Missouri, where the judgment of the lower court was affirmed. (*Kansas City* v. *St. Louis & Kansas City Land Co. et al.*, 260 Mo. 395, a copy of which opinion is hereinafter set forth.)

Plaintiffs in error in the Supreme Court of Missouri in their briefs assigned, among other errors, the following:

> "The court erred in refusing to the appellants the right granted by the State and Federal Constitutions and by the City Charter, to be heard upon the question of the amount of damages.
>
> The court by its rulings deprived appellants of their property without due process of law, in refusing to hear evidence upon the question of the value of the property taken or damaged under Ordinance No. 3209, in violation of the Fourteenth Amendment to the Constitution of the United States.
>
> The court by its ruling denied to appellants the equal protection of the laws in refusing to hear evidence of the value of the property taken or damaged under Ordinance No. 3209, in violation of the Fourteenth Amendment to the Constitution of the United States."

The Bridge Company filed a separate brief in the Supreme Court of Missouri, and assigned the following, among others, as error:

> "Because this proceeding deprives the appellant of its property without due process of law, and denies to it the equal protection of the laws of the land within the meaning of Sec. 30 of Art. 2 of the Constitution of Missouri, and of Sec. 1 of Art. 14 of the amendments to the Constitution of the United States of America."

Final Decision of Missouri Supreme Court.

Upon the case reaching the Supreme Court of Missouri, it was submitted upon briefs and orally argued by all parties. The Supreme Court of Missouri decided against the plaintiffs in error herein, and affirmed the judgment of the lower court. The following is a copy of its opinion:

"In the Supreme Court of Missouri.

In Banc. April Term, 1914.

Kansas City, Respondent,

vs. No. 18080

St. Louis & Kansas City Land Co., Chicago, Burlington & Quincy Railroad Co.; Chicago, Rock Island & Pacific Railway Co.; Union Pacific Railroad Co.; Union Depot Bridge & Terminal Railroad Co.; Missouri Pacific Railway Co.; Federal Investment Co.; Kansas City, St. Louis & Chicago Railroad Co.; The Chicago & Alton Railroad Co.; State Line Improvement Co.; Kansas City Stock Yards Co., and St. Louis & San Francisco Railroad Co., Appellants.

Lamm, C. J. "This is an appeal by corporate owners of property in Kansas City whose parcels were assessed to pay benefits to meet an award of damages to other persons whose property was taken or damaged in a proceeding to widen a street.

"Kansas City in 1909 undertook to open and widen Sixth street from the east line of Bluff to the west line of Broadway by condemning forty feet of private property on the south side of the street—Sixth street leading from the bottoms up town and being the main travelled thoroughfare for heavy hauling between the two. The authority for this proceeding was ordinance No. 3209, and, as there are several ordinances in the record, we will call this the 'original ordinance' *passim.* Under this original ordinance and in supposed compliance with charter provisions (Art. VI, 1908) condemnation proceed-

ings were instituted in a court known as the 'Muncipal Court' and ripened into judgment whereby damages were awarded for the land taken in the rise of $166,000, and the same amount was assessed against the City and over 13,000 different tracts owned by individuals and corporations, lying within a benefit district prescribed by said original ordinance. No appeal from this judgment was taken either by any land owner whose property was condemned nor by any land owner whose property was assessed with benefits. On that judgment the city collected of those benefit assessments the rise of $89,000, to pay said award of damages. Presently, and with matters in this fix, a certain railroad company, the Union Pacific, discovered the service on owners whose parcels were subject to assessment of benefits was defective and brought its suit in equity in the circuit of Jackon county against Kansas City and its officers, among them one Flynn. The life of the bill was injunctive relief in its favor (as an owner of property within the benefit district and which was assessed with benefits) against such assessment of benefits in the condemnation judgment under the original ordinance. Other parties in like fix (say, two or three) intervened. As there are several suits mentioned in this record, we will call this the 'Flynn suit' to identify it. The Flynn suit ripened into a decree in favor of plaintiff and interveners. It is sufficient to say of the Flynn suit that the condemnation judgment under the original ordinance was not assailed for lack of jurisdiction in the municipal court to hear any condemnation proceedings and assess any benefits to pay damages awarded therein (a newly discovered theory, now

pressed), but in substance that case proceeded on the theory that plaintiff had no notice of the proceeding and hence the judgment as to it was void. The chancellor found a lack of notice and process (the order of publication required by the charter was not published a sufficient time) and that the several assessments made against plaintiff's and interveners' properties were void because of such lack of service. Hence the muncipal court had acquired no jurisdiction of them. The scope and object of the decree in the Flynn case are indicated by the following excerpt:

> " 'It is, therefore, considered, ordered, adjudged and decreed by the court, that said assessments, in so far as they affect (sic) or purport to affect (sic) plaintiffs or any of them or any of their several properties, be and the same are hereby annulled and for naught held; that the several assessments against the respective properties aforesaid of the plaintiffs and each of them be and the same are hereby set aside and annulled; the defendant, Kansas City, M. A. Flynn, City Clerk; U. L. Weary, Clerk of said Municipal Court, and the officers and agents of said City, be and they are each of them perpetually restrained and enjoined from making out, certifying or attesting any tax bills against the several properties of the plaintiffs or any of them under and by virtue of said assessments, and that plaintiffs have and recover from the defendant Kansas City the costs herein expended and have execution therefor.'

"Neither side took an appeal from the Flynn decree and it remained operative as a perpetual injunction against collecting such unpaid assessments.

"With things in this fix, it seems that Kansas City attempted to repeal the original ordinance presumably for the purpose of abandoning the proceeding and returning to those paying assessments the amounts so paid. But the City was reckoning without its host; for pending such repeal measures, another injunction suit was brought in the Jackson circuit court—this time against the city and in favor of those property owners whose lands had been condemned under the original ordinance and who had been awarded damages, to-wit: one Tuller and others. These new suitors, Tuller and others, took the position in their bill that on recognized equitable principles the City, under its charter, could not repeal the original ordinance and abandon such condemnation proceedings so far as those persons were concerned whose property had been taken or damaged and to whom damages had been awarded by the judgment, where (as here) benefits had been assessed and in part paid, and where (as here) such property owners had appeared, tried out the issue as to them and recovered their damages, and where (as here) the judgment was not appealed from. We will call this case the 'Tuller case' for convenience. This Tuller case also ripened into a decree whereby the City was, in effect, perpetually enjoined from repealing the original ordinance and abandoning the condemnation proceeding, and this decree also was unappealed from but remained operative as a perpetual injunction.

"By the decrees in the Flynn and Tuller cases the City (to borrow the homely similitude of one of its briefs) was enjoined 'fore and aft. It could neither go forward nor backward.' In this peculiar con-

dition it enacted an ordinance, No. 7539, which we will call the 'supplemental or curative ordinance.' The general object and purpose of this supplemental ordinance was to authorize a proceeding to assess and spread the balance of the benefit assessments (viz., those unpaid under proceedings on the original ordinance) over the non-paying properties in the benefit district. This supplemental ordinance was based on the authority of Sec. 23, Art. VI, of the present charter of Kansas City and ran on the theory the unpaid benefit assessments were void. The charter provision in question, together with the supplemental ordinance, will be found set forth in *haec verba* in *State ex rel* v. *Sechorn*, 246 Mo. l. c. 549 *et seq.* (*q. v.*), and they will not be reproduced here. The object of said sensible charter provision was to afford a remedy when by any error, defect or omission in condemnation proceedings, assessments made against private property that cannot be enforced or collected or where property in the benefit district is omitted, etc. In such case it was provided that the City may by ordinance institute and carry on supplemental proceedings to make a proper assessment against any parcel of property in the benefit district erroneously omitted or erroneously made in the first proceeding, etc.

"Presently under such supplemental and curative ordinance a new proceeding was instituted in the municipal court to make a new assessment against such properties within the benefit assessment district as had not accepted the former judgment by payment. Proper charter notice was given and, among others, the present appellants, save one, appeared. The assessments left unpaid under the orig-

inal proceeding on the original ordinance were spread by this new proceeding over the non-paying parcels in the benefit district, assessing to Kansas City her share, and the appellants here, save one, appealed from that judgment to the Circuit Court of Jackson County and the case was assigned to Judge Seehorn's division. In that court such proceedings were had that the case reached a stage of the trial where Judge Seehorn announced his determination to try out the question of the amount of damages awarded to property owners whose property was taken or damaged under the original proceeding as well as the question of assessing and spreading benefits over non-paying properties within the benefit district—his view being that the non-paying property owners to be assessed with benefits were necessary parties to a proceeding awarding damages, hence a judgment void as to one was void as to the other; that to award damages and lay or spread assessments to pay them constitute an indivisible proceeding with two objects riding together.

"The pleadings in this supplemental proceeding warranting such contentions, two prohibition suits were brought in this court to stop the trial in Judge Seehorn's court—one we will call the 'Graham-Seehorn case,' the other the 'Tuller-Seehorn case.' Preliminary rules in prohibition issued and those cases will be found reported in the 246 Mo., at pages 541 and 568, respectively.

"So far as pertinent here, the Graham-Seehorn case held in judgment the main question: Had the charter court, known as the 'Municipal Court,' any jurisdiction whatever of any condemnation proceedings? That question we answered in the affirmative

by holding the court a constitutional repository of power in that behalf. In the Tuller-Seehorn case several questions were decided. One was that in supplemental or curative condemnation proceedings, brought in the municipal court under a supplemental ordinance, as here, an appeal would lie in favor of a property owner or any party interested to the Circuit Court. Another was that where such supplemental proceeding under such supplemental ordinance related only to making assessments on property against which an assessment was erroneously made in the original proceeding or was erroneously omitted to be made, as here, the jury should not include in their verdict the assessment of benefits and damages on property *properly* included in the first verdict, *i. e.*, those properties taken or damaged, the owners of which appeared at the first trial and acquiesced in the judgment, or those properties assessed with benefits the owners of which paid. But the scope of their verdict could not extend beyond the assessment of property so wrongfully made or omitted to be made. Another question decided was that the verdict and judgment in the original proceedings were valid and binding as *to those who appeared and accepted them*, and cannot be taken either as interlocutory or as vacated because of an appeal in the supplemental proceedings to the Circuit Court. Another question decided was that Kansas City by its charter may, through its common council, repeal an ordinance for widening a street and thereby a judgment for compensation and benefits in a condemnation proceeding is made void; but that such repeal is, by charter provision, restricted to 'any time before any of the parties assessed with benefits shall

have paid the amounts so assessed'; that the charter provision providing that no assessments made in the original proceeding in widening a street 'shall be affected or interfered with for the reason that any other assessment made in the same proceeding may be invalid in whole or in part' is the basis of the power given in the charter to the city by supplemental proceedings to subject only property omitted by mistake or illegally assessed to its proportional part of the costs of the improvement, and leaves the assessment of other property in the original proceeding either with damages or benefits stand as regular and not to be tried anew on an appeal in a supplemental proceeding, absent an appeal from the judgment in the original proceeding, as here, and present a payment of benefits and an award of damages to persons appearing, as here. Other reasons based on other charter reasons are given for that conclusion, and, among other things, it was held that the fact that a condemnation proceeding was an entirety, and the fact that the damages and benefits must balance each other, are no sufficient reasons for vacating the original judgment of the municipal court as to damages and benefits settled by it and acquiesced in, and are no sufficient reasons for a trial *de novo* of such particular matters on an appeal to the Circuit Court from a judgment in a supplemental proceeding. Another question decided in the Tuller-Seehorn case is thus correctly epitomized in the eighth syllabus:

> " 'Property owners in the benefit district whose property is not taken, but which will be charged with its share of the damages to be paid for the property taken for the street, are not necessary parties to the issue of the value of the property to be taken for the street; nor is

> it a denial of due process of law to deny to them a day in court to aid in preventing an unduly high valuation of the property to be taken whose value in the end must be assessed against their property. The necessary parties are the City as plaintiff and the owners of the property to be taken as defendants; though, as a matter of grace, the owners of other property in the benefit district may be permitted to aid in preventing a too high valuation.'

"Accordingly, in the Tuller-Seehorn case our writ issued and the Circuit Court of Jackson County was prohibited from trying the question of the amount of damages awarded to those property owners whose property was taken or damaged by the widening of Sixth street under the original unappealed-from judgment. Accordingly, in the Graham-Seehorn case we denied a writ of prohibition.

"When our judgments went down in those prohibition cases the Circuit Court of Jackson County resumed the trial of the appeal from the judgment of the municipal court in the supplemental proceeding at the point the trial was arrested by our preliminary rules in prohibition, proceeding to verdict and judgment in those particulars in line with our pronouncements in the prohibition cases, the verdict assessing part of the damages against the City, and part against the non-paying parcels of property in the benefit district, including appellants' parcels.

"Of the 13,000 tracts involved in the assessment of benefits, an aggregation of only thirteen corporate defendants appeal on due steps on a joint bill of exceptions. There is an appellant, the Union Depot Bridge & Terminal Railroad Company, that joins

in questions raised by its co-appellants but also raises questions singular to itself. Those questions will be considered separately.

"What we have to say in determining this appeal may be put under the following heads:

(1) Questions determined in the Tuller-Seehorn and Graham-Seehorn cases.

(2) New questions arising at the trial after our judgments in those two prohibition cases went down (and herein of those left open).

(3) Questions singular to the appeal of the Union Depot, etc., Company.

Of these *seriatim.*

I.

"Of questions determined in the Tuller-Seehorn and Graham-Seehorn cases.

"Broadly, and as a main proposition, it is contended by appellants' aggregation of veteran counsel that we determined nothing correctly in those two cases. Therefore, nothing was set at rest and every question there involved must be reagitated and redetermined. To that end we are cited to the same authorities relied on to sustain the selfsame propositions advanced in briefs in those cases and ruled adversely. It must be apparent that if there was a general rule allowing two hearings on the same questions it would be a blazing infirmity in the law. If courts put themselves in a limbo of nonsense and set themselves continuously to planting and then pulling up, weaving and then raveling (*vide* the classical legend of Penelope's web), to stitching and

then ripping, or, what amounts to the same thing, to deciding and then setting aside their own solemn adjudications, men and their posterity would think ill of our understanding. The doctrines of the law of the case are related to *stare decisis* and *res adjudicata* and are the settled doctrines of this Court —doctrines having their exceptions in emergencies, but none of those exceptions apply here. There would be no end to litigation and no certainty in the law unless we adhered rigidly to the general rule of the law of the case and applied the exception to that general rule with rare circumspection and only when a palpable wound had been inadvertently given to justice and where no injury would result from a change in our judgments. In the named prohibition cases we halted the trial below on the prayer of these appellants. Why so? To settle vital questions of jurisdiction they deemed necessary to a just hearing. We did settle them on full consideration, and the trial judge resumed the trial at the point he was arrested and thereafter proceeded with it in conformity with our rulings. Delay has occurred in a matter of pressing public moment and outlays have been made on the strength of our rulings. We deem it in the nature of a scandal to the administration of the law to undo at this late day what we have done by treading back on our tracks and sending this proceeding out of court with a tangle of confusion left behind and to the detriment of a great city, unless we are forced to do so by the imperious call of the law itself. We hear no such call. We see no such necessity. The stiff general rule is that the lower court was bound by our former decisions, and so are

we on second appeal. *Gracey* v. *St. Louis*, 221 Mo., l. c. 5 *et seq.*, and cases cited. We apply that rule.

"(a) It is argued on behalf of appellants, in effect, that the municipal court in which the proceedings originated is not a constitutional court for the purpose of condemning property, but that, under that instrument, exclusive jurisdiction rested in the Circuit Court. The industry of counsel (who, indeed, left no stone unturned) in pursuit of authority has been unable to cite us to a single Missouri case sustaining them. There is an array of them running counter in theory. The constitution provides for a municipal court. It contains provisions authorizing the people of certain cities to frame their own charters governing themselves in municipal matters, and that they may alter and amend them.

"In a line of great cases in this Court on all fours, wherein appeared great lawyers to raise questions and elucidate contentions, it has uniformly been ruled that those charter provisions relating to the exercise of the right of eminent domain and the power to prescribe benefit districts, spread benefits over lots therein, pay damages for property condemned under the exercise of the right of eminent domain are one and all matters of purely municipal concern and are governed by charter provisions. As pointed out, in the Graham-Seehorn case it was ruled that jurisdiction was properly lodged in the municipal court. This conclusion was arrived at by considering the constitution, the charter and the pertinent general doctrine of a line of unshaken cases. Accordingly, on the authority of the Graham-Seehorn case we disallow the point to appellants. In a somewhat similar case in New York (*Worth-*

ington v. *London G. and A. Co.*, 164 N. Y. 81), where the question was whether a municipal court of the city of New York had jurisdiction, and where it had been ruled adversely by some inferior courts, Bartlett, J. (speaking to such decisions and for the Court of Appeals), used apposite language, viz.:

> " 'This decision has such a serious effect on the business interests of a great city containing about three millions and a half of inhabitants, that the question may well be asked whether a situation is not presented where the familiar rule of construction may be applied most rigidly, that a statute can be declared unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to and reconciliation has been found impossible, the statute will be upheld.'

"The rule invoked by the New York court to prevent a statute's perishing by construction is the trite doctrine of this Court to be found in almost every volume of its reports.

"Take this case, to illustrate the far-reaching effect of destroying the jurisdiction of the municipal court of Kansas City in opening and widening streets and spreading benefits over a district, thereby striking down all it has done and all its predecessor, the mayor's court, did in that City in such matters of emphatic municipal concern, led us in the Graham-Seehorn case by permissible rules of construction, to sustain the constitutional jurisdiction of the municipal court. We were glad to do that then and we are glad to stand by that ruling now. *Stare decisis.*

"(b) It is argued on behalf of appellants, who, it must be remembered, are not lot owners whose property was taken or damaged, but are lot owners whose properties are assessed with benefits, that they were entitled to be heard as parties on the question of the amount of damages, that to deny them a hearing on that issue violates those constitutional provisions guaranteeing due process of law and equal protection of the law. But this contention (with a group of related ones we will not enumerate) was squarely held in judgment in the Tuller-Seehorn case and squarely decided against appellants. That case must be read with this, for we will not reformulate or reproduce its doctrines. Appellants had due process of law in the trial *nisi* on the question of benefits. They attempted to show there were none and took the verdict of the jury thereon and on the amount, if any. That question (benefits) relates to the power of taxation, while the part of the proceeding relating to the taking and damaging of property rests on another power, to-wit, the exercise of the sovereign power of eminent domain. They are distinct in quality and are governed by different principles. We ruled in the Tuller-Seehorn case, in effect, that lot owners whose properties were subject to assessment in the benefit district were not necessary parties to that part of the proceeding in the sense that the validity of the judgment depended on notice to them; that as the parties whose properties were taken or damaged in the original proceeding appeared to the notice given and submitted to judgment, the amount of their damages became *res adjudicata* and were not open to further inquiry. The

Tuller-Seehorn case stands on its own reasoning and on the authorities it cited and reviewed. We deem the question, therefore, foreclosed.

II.

"Of new questions arising at the trial after our judgment in the prohibition cases went down (and herein of those left open).

"(a) It is argued that the decree in the Flynn case was *res adjudicata;* that the effect of the ruling in that case was to make void the entire original proceeding, hence there was nothing to supplement by a supplemental proceeding. If appellants' premises were true, their conclusion might be allowed as sound. But under our rulings in the prohibition cases, *supra*, the premises are not true, hence the conclusion is unsound. Hereinbefore we set forth the material part of the Flynn decree and therefrom it appears that certain assessments alone were made void. The decree was cautious and precise in that regard. Now, in our judgment in the Tuller-Seehorn case the original proceedings so far as the amount of damages for property taken was concerned, and so far as the assessments of benefits on lots whose owners acquiesced in the decree and paid the benefits were concerned, was upheld. We but follow that ruling in disposing of the point in hand as we have done.

"(b) It is argued by appellants that Sec. 23, Art. VI, of the charter relating to supplemental proceedings to cure errors, defects and omissions in the original proceeding has no application to the case at

bar. We disallow that contention. The charter provision and the supplemental ordinance are set forth in full in the Graham-Seehorn case (246 Mo., l. c. 549, *et seq., q. v.)*. The charter provision is a sensible one. In carrying through condemnation proceedings errors and omissions, despite care and pains, are likely to arise, where, as here, there are a vast number of tracts and many tract owners involved, and such supplemental proceedings are provided for in said charter provision, *inter alia*, 'to properly assess against any piece or parcel of private property against which an assessment was in the first proceeding erroneously made or omitted to be made the proper amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement,' etc. Certainly in the case at bar it is well within a proper use of English to say that the assessment of lots within the district owned by persons who repudiated the proceeding were erroneously made or were omitted to be made in a true sense. To rule as appellants ask us would crib and confine the charter provision to bounds too narrow to meet the mischiefs at which it was aimed. Our bounden duty is to construe it (if allowable in reason so to do) to meet those mischiefs and thus further its evident purpose. Accordingly the point is disallowed to appellants.

"(c) It is further argued on their behalf that the original ordinance is void on its face, for that it requires the amount allowed for private property taken to be wholly raised by special assessments against the property described in the benefit district. The point hinges on the fact that Sec. 3, Art. VI, of the charter directs there shall be assessed against the City the amount of benefits to the City

and public generally, inclusive of any benefit to any property of the City, and that the balance, if any, be spread over the several tracts of private property in the benefit district. The original ordinance is unhandsomely worded, but when due effect is given to all its words and its intendment is allowed to arise on the whole instrument, it will appear that the construction sought to be put upon them is unnecessarily harsh. A law ought not to be tortured so that a vice may appear by *wringing* it. The ordinance has the following provisions:

> " 'And all private property within said limits is hereby taken and condemned for public use as a part of Sixth street and just compensation therefor shall be assessed, collected and paid, according to law. The amount allowed for private property taken, shall be wholly raised by special assessments made against the property described in the next succeeding section in accordance with Article VI of the charter of Kansas City, Missouri.'

"It will be observed it requires that compensation for condemned property 'shall be assessed, collected and paid, according to law.' It will also be observed that those assessments must be made "in accordance with Article VI of the charter of Kansas City, Missouri." We do not think the validity of the supplemental proceedings breaks on the point made. This because:

"(1) Counsel point us to no provision of the charter requiring the ordinance to make the quoted recitals and we have not been able to put our finger on one. The charter stands on its own legs, and, in

that regard, seems self-enforcing. It is full and explicit, leaving no room for doubt in the particulars in hand, and, as to them, does not seem to need the adventitious aid of any ordinance.

"(2) Giving effect to all the ordinance words and construing them with the charter, to which the ordinance points for the law and for the rule of making assessments, its meaning is clear enough, to-wit, that the charter is to be followed.

"(3) Moreover, that was the trial theory. The charter was followed. The City was assessed its charter share and not a particle of injury came to appellants because of the objectionable phrase.

"(4) But more (and most of all) the instant proceeding, in those parts vitally affecting appellants, was under the supplemental ordinance (246 Mo. l. c. 550, *et seq.*), and that ordinance pointed only to the charter and made a call on its provisions for the rules to govern the supplemental proceeding.

"Accordingly the point is disallowed to appellants.

"(d) Finally it is argued that the supplemental ordinance is void on its face because (we quote from appellants' 'Points and Authorities': '* * * this ordinance is vague, indefinite and uncertain in its terms and does not comply with said Section 23, which required the proceedings to be 'to properly assess against any piece or parcel of private property against which an assessment was in the first proceeding *erroneously* made, or omitted to be made, the proper amount,' etc., and further that 'such supplemental proceedings shall be instituted and conducted *as to the particular piece or pieces* of private property sought to be acquired or assessed,' etc."

"In the evolution of their argument under this head the order of publication to property owners is criticised for alleged equivalent vices. But it will be observed that the order of publication is wholly distinct from the ordinance and that the point made does not include that step in the proceeding directed to giving notice by order of publication. Appellants appeared to the order and tried their case on the merits. We do not say that where that is done a case might not be put where an objection might not be made at the hearing to the order of publication. But we do say that an appearance and a trial on the merits leave parties in an uncommonly serious predicament in so far as objections to the form of the order are concerned. We think there is no substantial merit in this phase of the matter.

"As we gather it, appellants contend that the supplemental ordinance should have described by metes and bounds or some definite description each particular tract of the 13,000 erroneously omitted or erroneously assessed in the original proceeding. We do not think so. If we rule in that way as to the supplemental ordinance it would follow that the original ordinance should particularize by precision of description each separate tract in the benefit district. Why prescribe such an enormous publication descending into so many particularities in which a variation from the fact would breed a new crop of errors and omissions? The settled practice has been not to descend to such particularity. Up to this time notice to the property owners generally in the described benefit district and defining the district, as here, have been sufficient to bring in interested parties. It was sufficient in this instance. They

came in. Not one of them had any difficulty in finding where the shoe pinched him. Each knew the issue involved and directed its proof to that issue. So that, while we have been informed and instructed by the ingenious refinement of the point, we have not been convinced it is sound.

"(e) Some criticism is indulged on the instructions. It would swell this opinion beyond bounds to reproduce all of them, and thereby by ocular demonstration show that they did not conflict with each other but announced propositions of law agreeable to our rulings in the Graham-Seehorn and Tuller-Seehorn cases. We are of opinion appellants received favorable consideration at the hands of the court in instructions and that the verdict of the jury and judgment of the court ought not to be disturbed on that score.

III.

"Of questions singular to the Union Depot Bridge & Terminal R. R. Co.

"The Union Depot, etc., Co. owned a small tract of land in the benefit district, was assessed a small benefit thereon in the original proceding and paid the assessment. As we grasp it, it laid claim to shore land on the Missouri river in the benefit district. There were other claimants for this land, among them the City, and a suit was pending in the Federal court to determine and settle title. Things were in this fix when the original condemnation proceeding was tried. We think it clear that no assessment whatever was made against this land by the original

verdict and judgment. In the map filed with the original ordinance to initiate the original proceeding these disputed shore lands were marked "owned or clamed by the Union Depot Bridge and Terminal Railroad Co. and Kansas City, Missouri" endorsed across them. The record is not as plain as it might be and it is possible that different hypotheses might spring because of obscurity, but a study of it leads us to the conclusion these shore lands were omitted —doubtless owing to the fact that the ownership was in controversy. Between the time of the first verdict and judgment and the time of the supplemental proceedings a compromise was made in such Federal suit and by agreement between an aggregation of claimants certain tracts of these shore lands were given to appellant and certain parts respectively to other litigants, and a decree was entered in the Federal court vesting and quieting these respective titles. When the supplemental proceedings were brought to a head by verdict and judgment the several tracts of shore land awarded the present appellant by that decree were assessed with benefits—at first, in gross, but (subsequently by amended decree) the benefits were spread in a definite amount over each separate tract. It does not seem this appellant appeared and took any part in the trial under the supplemental ordinance and proceeding. It had the same notice by publication all other tract owners had, but it chose the course of keeping in the background. When the verdict came in in the supplemental proceeding assessing its shore land tracts with benefits, it for the first time appeared and filed a motion for a new trial. In a nut shell it claims that the judgment in the first

proceeding was *res adjudicata* on the question of its liability to assessment for these lands. This contention splits itself into branches. In the first place, the hypothesis is indulged that the lands are covered by the assessment of benefits against the City in the original proceeding. Again, that they are covered by a clause in the original verdict to the effect that lots and parcels of land lying within the benefit district as prescribed by the ordinance 'and not hereinbefore mentioned and described, we assess no benefits.' If the latter view be taken, then appellant confronts the proposition that the first verdict in that behalf was a nullity because of lack of notice. On the other hypothesis, it is sufficient to say that the record does not bear out the theory.

"Appellant came into the case late, and on a motion for a new trial. It filed no affidavit of newly discovered evidence. It brought to the attention of the court the Federal decree on that motion. That was not newly discovered, but we pass the point to let the matter ride off on its merits. We are of opinion that the land was erroneously omitted in the first assessment and that appellant ought not to complain over paying its share of the cost of the improvement with its co-appellants and all other property owners in the benefit district.

"Other questions are raised we deem immaterial. There are a superabundance of briefs in the case, and, doing the best we can with the record, we are of opinion the judgment below was right and should be affirmed. It is so ordered.

"All concur except Graves and Woodson, J. J., who dissent for the reasons stated in their dissent in *State ex rel. Graham* v. *Seehorn*, 246 Mo. 541."

From the above and foregoing decision of the Supreme Court of Missouri, plaintiffs in error have *jointly* sued out a writ of error herein to the Supreme Court of Missouri, directing it to send up the record here, which has been done.

ASSIGNMENTS OF ERROR.

Plaintiffs in error have filed in this Court eleven assignments of error in which they claim, in substance and effect, that the Supreme Court of Missouri, in its decision above set forth, erred in holding and deciding that they were not entitled, in the supplemental proceedings, to a hearing on the amount of the award allowed as damages for the property of other parties, condemned and taken under the original ordinance and in the original proceedings, for a public street; and that in so holding and deciding they were deprived of their property without due process of law and were thereby denied the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

The following is a full copy of their assignments of error in this Court, omitting caption and signatures:

"Now comes St. Louis & Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Union Depot Bridge & Terminal Railroad Company, Edgewater Terminal Railway Company, Missouri Pacific Railway Company, Federal Investment Company, Kansas City, St. Louis & Chicago Railroad Company, The Chicago & Alton Railroad Company, State Line Improvement Company, Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company, plain-

tiffs in error, and make and file this, their assignments of error, as follows:

"(1) The Supreme Court of the State of Missouri erred in holding that plaintiffs in error were not entitled to a hearing on the amount of damages under the provisions of Sections 2, 3 and 6, of Article 6, of the charter of Kansas City, Missouri; and that, in and by such ruling, the plaintiffs in error herein were deprived of property without due process of law, and denied the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States, in this, that due process of law requires notice before hearing, and an opportunity to be heard, and that, by Section 2, of Article 6, of the charter of Kansas City, Missouri, it is provided that the court shall make an order, appoint a day and place, for impaneling a jury to ascertain the compensation for property to be taken or damaged, and to make assessments to pay for the same, which order shall recite the number and title of said ordinance, with the date when it took effect, and contain a description of the property proposed to be taken or damaged, and also a description of the property contained in the benefit district, as described in said ordinance, and name the day and place fixed by the said court for impaneling a jury to ascertain the compensation for property taken or damaged, and to make assessments to pay for the same, and that a copy of such order shall be published in the newspaper at the time doing the City printing for four successive weeks, the last insertion to be not more than one week prior to the day set for said hearing, and that no notice of said proceedings shall, in any case, be necessary to

the validity thereof, except the publication of the order as herein provided. Notice so given by publication shall be sufficient to authorize the court to hear and determine the cause, and make any finding or order, or render any judgment therein, etc. And by Section 3 of said Article the right to a hearing is given as follows: 'Parties interested may submit evidence to the jury, and the latter shall examine the property to be taken, damaged, and assessed.' And by Section 6 of said Article the owner interested in any of the property taken or damaged, or the owner of any property assessed benefits, who shall feel aggrieved by the verdict of the jury, may, within twenty days from the time the judgment is confirmed, appeal to the Circuit Court of Jackson County, Missouri, at Kansas City, where the case shall be tried *de novo* in said Circuit Court; and that, in and by the original proceedings under Ordinance No. 3209, no valid and sufficient notice was given, as required by said Section 2, which fact was found by the Circuit Court of Jackson County, Missouri, in a proceeding to enjoin the collection of the benefit assessed against the property of the plaintiffs in error herein, and no notice was given to the property owners whose property was assessed for benefits in the district, as required by Section 2, of Article 6, of the charter of Kansas City, Missouri, aforesaid; and that, in and by such proceedings, the said plaintiffs in error were denied a right to a hearing on the question of the amount of damages, and were denied the right of taking an appeal to the Circuit Court of Jackson County, Missouri, and having the same tried *de novo;* and that, in and by such proceeding, the court has denied to these

plaintiffs in error the right to a notice provided by said charter aforesaid; and in and by such proceedings the trial court, and the Supreme Court of the State of Missouri, denied to the plaintiffs in error due process of law, and denied to them the equal protection of the law, in violation of the Constitution of the United States, in this, that they have been assessed benefits without any hearing, or an opportunity to be heard upon the amount of damages for property taken, and the amounts to be assessed against them as benefits to pay for the same; and that, in and by such proceedings, there was a want of notice, and that such proceedings, without such notice, did not constitute due process of law provided for by the Fourteenth Amendment to the Constitution of the United States; and that said decisions of the Supreme Court of the State of Missouri denied to plaintiffs in error a title, right, privilege and immunity held by the plaintiffs in error under the Constitution and statutes of the United States; and that the Supreme Court of the State of Missouri decided against such right, title, privilege and immunity, to the manifest error of the plaintiffs in error herein.

"(2) The Supreme Court of the State of Missouri erred in holding that the City had a right under the so-called supplemental proceedings held under Ordinance No. 7539 to assess property with benefits without the property being described in said ordinance, which it was claimed were not properly assessed, and which was omitted to be assessed, or wrongfully assessed, in the original proceedings; and in holding that Section 23, of Article 6, of the charter of Kansas City, Missouri, warranted assess-

ing benefits in such supplemental proceedings against the plaintiffs in error herein without awarding them a right to be heard on the amount of damages in the municipal court, deprived the plaintiffs in error of their property without due process of law, and denied to them the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States; and that the plaintiffs in error herein claimed said right, privilege and immunity in the trial court and in the Supreme Court of the State of Missouri, but the decision of the trial court and the decision of the Supreme Court of the State of Missouri was against said right, title, privilege and immunity so held by your petitioners under the Constitution and statutes of the United States, and herein the court erred to the manifest injury of the plaintiffs in error herein.

"(3) The Supreme Court of the State of Missouri erred in holding that as to the Union Depot Bridge & Terminal Railroad Company the said supplemental proceedings were sufficient to give the court jurisdiction of said Company to assess the benefits, notwithstanding that benefits had been assessed under Ordinance No. 3209 and had been paid by said Company, and that, in so holding, the trial court and the Supreme Court of the State of Missouri deprived said Union Depot Bridge & Terminal Railroad Company of its property without due process of law, in that the said proceedings were not sufficient to give any notice to the said Union Depot Bridge & Terminal Railroad Company that its property would again be assessed in said proceedings, for, upon the face of the record, it had already been assessed under Ordinance No. 3209, and had paid

said assessments, as shown by the records, and it was not named in the supplemental proceedings, and said supplemental proceedings were intended to be brought for one purpose only—to correct errors and omissions made in the previous assessment under Ordinance No. 3209, which had been held invalid, and that there was nothing in said supplemental proceedings notifying the said Union Depot Bridge & Terminal Railroad Company that its property would again be assessed, and that the court, in so holding such proceedings to be sufficient, denied to the said Union Depot Bridge & Terminal Railroad Company due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States; and that such right, privilege and immunity was claimed in the Supreme Court of the State of Missouri, and the decision of that court was against such right, privilege and immunity guaranteed by the Constitution of the United States, and herein the Supreme Court of the State of Missouri erred to the manifest injury of the plaintiffs in error herein.

"(4) The Supreme Court of the State of Missouri erred in holding that Section 23, of Article 6, of the charter of Kansas City, Missouri, authorized and permitted, under the so-called supplemental proceedings under Ordinance No. 7539, benefits to be assessed against persons who had never been made parties to the first proceeding, and who had not been served with the notice required by Section 2, of said Article 6, so as to give the court jurisdiction over the said parties, and over their property; and that, in and by such proceedings, as shown of record, no jurisdiction was acquired over the plaintiffs in error

herein under the proceedings held under Ordinance No. 3209, and, therefore, there was nothing that could be supplemented, and that, to give Section 23, of Article 6, of the charter of Kansas City, Missouri, such construction violates the provisions of the Fourteenth Amendment to the Constitution of the United States, in this, that it takes the property of the plaintiffs in error without due process of law, and denies them a hearing in court which is authorized and provided for by Section 2, of Article 6, of the charter of Kansas City, Missouri, aforesaid; and that, in and by such construction of said section, it permits the said Kansas City to violate the terms of Section 2, of Article 6, of its charter, and takes from the plaintiffs in error herein the right to be heard under the original proceedings under Ordinance No. 3209, and to offer testimony as to the amount of damages and the benefits to be assessed against the property of the plaintiffs in error in said district; and that such construction permits the City to take advantage of its own wrong and thereby deprive the plaintiffs in error herein of a hearing given by Section 2, of said Article, and cutting them off from a right to be heard and a right to offer proof as to the amount of damages to property to be taken, and the amount of benefits to be assessed against the property benefited in the district; and that, in and by such construction, as applied to the proceedings under Ordinance No. 7539, the court deprived the plaintiffs in error of a right to be heard, without any fault on their part, and denied them a right to introduce proof under the original proceedings, without any fault on their part, but by reason of the default of the City in failing to give them

proper notice of the pendency of such proceedings, and that, under the construction given to Section 23, of Article 6, of the charter of Kansas City, Missouri, aforesaid, the Supreme Court of the State of Missouri denied to the plaintiffs in error due process of law, and denied to them the equal protection of the law guaranteed them by the Fourteenth Amendment to the Constitution of the United States; and that, in so deciding against them in said proceedings, the court denied a right, title, privilege and immunity given them under and by virtue of the Constitution of the United States.

"(5) The trial court erred in refusing to permit the plaintiffs in error to show that the property proposed to be taken and damaged under Ordinance No. 3209 was not of the amount assessed by the jury; and the trial court denied the plaintiffs in error the right to be heard upon such question in the supplemental proceedings, and, in denying them such right, the court denied to them a right, title, privilege and immunity given them by the Fourteenth Amendment to the Constitution of the United States, in that it denied them due process of law, and denied them the equal protection of the law, and this without any fault or negligence on their part, but wholly by the default of the City in not complying with the terms of Section 2, of Article 6, of the charter of Kansas City, Missouri, aforesaid; and that said right, title, privilege and immunity was claimed by these plaintiffs in error in the Supreme Court of Missouri, and the decision of the said Supreme Court was against such right, title, privilege and immunity, after said right, title, privilege and immunity had been claimed in the trial court, and

denied by said trial court; and the Supreme Court of the State of Missouri denied them the right to be heard on the question of damages, and denied them due process of law, and equal protection of the law guaranteed them by the Fourteenth Amendment to the Constitution of the United States.

"(6) The Supreme Court of the State of Missouri erred in holding that the notice given under Ordinance No. 7539, called the supplemental proceedings, was sufficient to constitute due process of law, as against the plaintiffs in error herein, and, in so holding, the court denied to the plaintiffs in error herein due process of law, and the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

"(7) The Supreme Court of the State of Missouri erred in holding that the plaintiffs in error herein had no right to have a hearing upon the question of the allowance of damages for the property taken, and herein the court erred, for the reason that, under the plain provisions of the charter of Kansas City, Missouri (Sections 6 and 23, of Article 6), the plaintiffs in error herein had a right to have a hearing upon the question of the allowance of damages for the property taken, and the amount of benefits to be assessed against their property, and the denial of this right deprived the plaintiffs in error of their property without due process of law, as provided for in said charter.

"(8) The Supreme Court of the State of Missouri erred in holding that the proceedings under Ordinance No. 7539, provided for by Section 3, of Article 6, of the charter of Kansas City, Missouri, were authorized, and that the same were constitu-

tional, and that the same gave the municipal court of Kansas City jurisdiction to hear and determine the supplemental proceedings instituted and carried on thereunder; and that, in and by such rulings, the Supreme Court of the State of Missouri denied the plaintiffs in error herein due process of law guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

"(9) The Supreme Court of the State of Missouri erred in holding that the City of Kansas City could institute supplemental proceedings under Section 23, of Article 6, of the charter of Kansas City, Missouri, after a part of the appellants had instituted a suit in the Circuit Court of Jackson County, Missouri, to declare the assessment of benefits against their property null and void for want of proper notice, and in deciding that the judgment of the trial court was of no force and effect, and that the City could supplement proceedings that had already been held void between the City and the appellants herein without complying with the provisions of Section 2, of Article 6, of the charter aforesaid, denied to the plaintiffs in error the rights, privileges and immunities given and guaranteed by the charter of Kansas City and by the law of the land, and, in doing so, the Supreme Court of the State of Missouri denied to the plaintiffs in error herein due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

"(10) The Supreme Court of the State of Missouri, by its judgment, and by its affirmance of the judgment of the trial court, has deprived the plaintiffs in error, and each of them, of their property

without due process of law, and without any notice required by the charter of Kansas City, Missouri, all in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, in that it denies to the plaintiffs in error their property wihout due process of law, and therefore violates the Fourteenth Amendment to the Constitution of the United States, in denying the plaintiffs in error the equal protection of the law.

"(11) The Supreme Court of the State of Missouri erred in holding that the plaintiffs in error were bound by the decision in the case of *State ex rel. Tuller* v. *Seehorn*, 246 Mo. —, when the records of the court show that these plaintiffs in error were not parties to said suit, and were therefore not bound by such proceedings; and, in holding that these plaintiffs in error were bound by such decision in a case in which they were not parties, denied to them due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and further denied to these plaintiffs in error the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

"Wherefore, plaintiffs in error ask, by reason of each and every one of the foregoing assignments of error, that the judgment and decision of the Supreme Court of the State of Missouri in the above entitled cause be reversed and for naught held, and that the plaintiffs in error have and recover of the defendant in error all costs herein expended."

Defendant in error, Kansas City, has filed its motion herein to dismiss the writ, or to affirm the

judgment of the Supreme Court of Missouri, for the reasons therein stated and hereinbefore set forth.

The above and foregoing statement of the facts is sufficient of the record filed herein to present the merits of said motions.

ANDREW F. EVANS,
City Counselor of Kansas City, Missouri, and
ARTHUR F. SMITH and
JESSE C. PETHERBRIDGE,
Assistant City Counselors of Kansas City, Missouri,
Attorneys for Defendant in Error.

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No. 261

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

St. Louis and Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Union Depot Bridge & Terminal Railroad Company, Edgewater Terminal Railway Company, Missouri Pacific Railway Company, Federal Investment Company, Kansas City, St. Louis & Chicago Railroad Company, The Chicago & Alton Railroad Company, State Line Improvement Company, Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company, Plaintiffs in Error,

vs.

Kansas City, Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR ON MOTION TO DISMISS WRIT OF ERROR, OR AFFIRM JUDGMENT OF MISSOURI SUPREME COURT.

I. N. WATSON,
H. M. LANGWORTHY,
EDWARD WHITE,
KENNETH McC. DEWEESE,
E. M. [illegible],
Attorneys for Plaintiffs in Error.

ANDREW F. EVANS,
City Counselor of Kansas City, Missouri, and
ARTHUR F. SMITH and
JESSE C. PETHERBRIDGE,
Assistant City Counselors of Kansas City, Missouri,
Attorneys for Defendant in Error.

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No. 656.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

St. Louis and Kansas City Land Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island & Pacific Railway Company, Union Pacific Railroad Company, Union Depot Bridge & Terminal Railroad Company, Edgewater Terminal Railway Company, Missouri Pacific Railway Company, Federal Investment Company, Kansas City, St. Louis & Chicago Railroad Company, The Chicago & Alton Railroad Company, State Line Improvement Company, Kansas City Stock Yards Company, and St. Louis & San Francisco Railroad Company, Plaintiffs in Error,

vs.

Kansas City, Defendant in Error.

STATEMENT.

In October, 1909, Kansas City, Missouri, began condemnation proceedings to widen 6th Street, from Broadway to Bluff Street, in said city. The city passed Ordinance No. 3209, under which it attempted to con-

demn a strip of land on the south side of Sixth Street, 40 feet in width, and extending from Broadway to Bluff Street in said city. The charter of Kansas City, Article 6, Section 2, requires that the city shall pass an ordinance describing the private property to be taken or damaged, and if the same is to be paid for wholly or partly in assessments, shall describe the limits within which private property shall be deemed benefited by the proposed improvements, and be assessed to pay compensation therefor. Thereupon, the city engineer shall make out and deliver to the clerk of the Municipal Court a statement by plat, map, or otherwise containing a correct description of the several lots or parcels of private property to be taken or damaged, with the names of the owners or parties interested therein, and the court shall thereupon, *by order*, appoint a day and place for empaneling a jury to ascertain the compensation for the property to be taken or damaged, and make assessments to pay for the same, which *order shall recite* the number and title of said ordinance, with the date when it took effect, and contain a description of the property proposed to be taken or damaged, as contained in said ordinance, *and also a description of the property contained in the benefit district, as described in said ordinance*, and naming the day and place fixed by said court for empaneling a jury to ascertain the compensation for property to be taken or damaged, *and to make assessments to pay for the same, which order shall be directed to all persons to whom it may concern.* Section 3, of Article 6, provides that, to pay such compensation, the

jury shall assess against the city an amount of benefit to the city and public generally, inclusive of any benefits to any property of the city, and the balance of said compensation they shall assess against the several lots of private property within the benefit district, exclusive of the improvements thereon, deemed benefited by the proposed improvement, *"each lot or parcel of ground to be assessed with an amount bearing the same ratio to such balance as the benefit to each lot or parcel bears to the whole benefit to all the private property assessed."* Parties interested may submit evidence to the jury, and the latter shall examine personally the property to be taken, damaged and assessed. Section 6 provides that, in case the city, or any person affected by the proceedings, either as the owner thereof or interested in any of the property taken or damaged, *or as the owner of or interested in any of the property assessed*, shall feel aggrieved by the verdict of the jury, such party so aggrieved may, within twenty days from the time the verdict of the jury is affirmed, appeal to the Circuit Court of Jackson County, Missouri, at Kansas City * * * and said case, unless dismissed, shall be tried *de novo* in the said Circuit Court and have precedence over all other cases for trial.

Section 23, of Article 6 provides for supplemental proceedings when the original proceedings are defective in certain respects therein named. That section provides that when, by reason of any error, defect or omission in any proceedings, or in the verdict or judgment thereunder, that may be instituted under the pro-

visions of this article, the portion of the private property sought to be taken or some interest therein, can not be acquired, or any assessment is made against private property which can not be enforced or collected, or when, by reason of any such defect, private property in the benefit district is omitted, the city may, by ordinance, institute, carry on and maintain supplemental proceedings to acquire the right and title to such property, or interest therein, or to any piece or parcel of private property against which an assessment was, in the first proceeding, erroneously made, or omitted to be made, the proper amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement, to be determined by the verdict of the jury, and the original assessments may be revised, corrected, increased or diminished as may be necessary or equitable under the provisions of this article, for the original proceedings. Such supplemental proceedings shall be instituted or conducted as to *the piece* or *particular piece of private property* sought to be acquired or assessed in like manner and with like effect as in the original proceedings, and shall be known and described as supplemental proceedings, for the purposes specified in the original ordinance. And the supplemental verdict and assessment shall be made, confirmed and copies of the original verdict certified in every particular as in the original proceedings. The Supreme Court construed this section in *State ex rel. v. Seehorn*, 246 Mo. 577, and held that the supplemental proceeding was not as broad as the original proceedings

but only related to certain specific piece or pieces of private property sought to be acquired or assessed and therefore an appeal by a property owner when property was assessed benefits did not bring into review any of the proceedings relating to the assessment of damages. The Supreme Court did not hold that a property owner in the benefit district did not have a right to be heard on the apportionment of the benefits over the entire district. But if the property owner has been properly notified in the original proceeding and is not satisfied with the verdict he has the right to appeal to the Circuit Court and have the entire case tried *de novo*. On such appeal the property owner in the benefit district has a right to introduce any evidence both as to the value of the property taken and the property charged with benefits.

State ex rel. v. *Gill*, 84 Mo. 248.
Kansas City v. *Morton*, 117 Mo. ....

The charter also provides that, when the assessments have been confirmed, the clerk may certify the same to the Circuit Court and have the tax bills recorded and indexed as a judgment in favor of Kansas City against the property described in such special tax bills.

After the city had passed Ordinance No. 3209, the Municipal Court made an order which is set out in the record, and the court directed that a copy of this order be published in the Daily Record, a newspaper at this time doing the city printing, for four consecutive weeks, the last insertion to be not more than one week prior to the day set for said hearing, and that

a copy of this order be served, as by the charter of Kansas City provided, upon each and every resident of Kansas City owning or having an interest in the real estate proposed to be taken or damaged. The affidavit of publication showed that this publication was not made for four consecutive weeks, and the last publication, although required to be not more than one week prior to the date set for said hearing, was more than one week prior to said date. The notice was directed to all persons whom it may concern, and it provided, "Now, therefore, you and each of you are hereby notified that the 6th day of December, 1909, at two o'clock P. M., is the day, and the Lower House Council Chamber, on the 4th Floor of the City Hall Building, on the Southeast corner of 4th and Main Streets, in Kansas City, Jackson County, Missouri, is the place fixed for empaneling a jury to ascertain the compensation for the property to be taken or damaged and to make assessments to pay for the same."

The case was continued from time to time until the 7th day of March, 1910, when the jury reported that they had viewed the property to be taken, damaged and assessed, and the record recites and "having heard the evidence and been instructed by the court, rendered their report and verdict and are by the court discharged."

Thereafter the Union Pacific Railroad Company and others herein filed their bill in equity in the Circuit Court of Jackson County, Missouri, at Kansas City, against Kansas City, M. A. Flynn, City Clerk of Kansas City, U. L. Weary, Clerk of the Municipal Court

of Kansas City, and Oscar Hochland, Clerk of the Circuit Court of Jackson County, Missouri, to enjoin the collection of said assessments, and in said bill it was charged that Kansas City had not given the proper notice and had not made the publication required by the charter of Kansas City, and prayed the court to make an order perpetually restraining and enjoining each of the said defendants from executing said judgment of the municipal court and from making out and certifying any tax bills against the property of the complainants, and that the circuit clerk be enjoined or restrained from recording any of the tax bills as a judgment in favor of Kansas City against the above described property of complainants, and from issuing any execution thereon out of said Circuit Court; and they further prayed the court to adjudge and decree that such proceedings to open and widen 6th Street and to assess benefits against the complainants' property, be declared in violation of the charter of Kansas City, and null and void, and that such publication be decreed to be not due process of law required by the 14th Amendment to the Constitution of the United States, and that said proceedings be declared to be no lien on the property of the complainants described. The said cause was heard on the 31st day of January, 1911, and thereupon the Circuit Court of Jackson County, Missouri, made the following finding: "And the court further finds that none of said complainants were served with notice of process of any kind in said proceedings in the Municipal Court; that none of said

plaintiffs had any knowledge thereof or opportunity to be heard thereunder; that none of said plaintiffs entered appearance therein in person or by agent or attorney, and none of them had any knowledge of the finding in said proceedings until long after the verdict therein had been rendered and confirmed and judgment thereon entered, and the time within which appeals might be taken therefrom had expired. * * * The court further finds that said *proceedings, verdict and confirmation thereof, and judgment is as to these plaintiffs and each of them, and as to their respective properties, inoperative and of no effect, and that the several assessments undertaken to be made and levied on the plaintiffs' said property are void, and that said Municipal Court in said proceedings had acquired no jurisdiction therein of the plaintiffs, or any of them, or of their said properties.* It is therefore considered, ordered, adjudged and decreed by the court that said assessments insofar as they affect, or purport to affect, plaintiffs, or any of them, or any of their several properties, be, and the same are hereby null and void and for naught held; that the several assessments against the respective properties aforesaid of the plaintiffs, and each of them, be and the same are hereby set aside and annulled; and that the defendants, Kansas City, M. A. Flynn, City Clerk, U. L. Weary, Clerk of said Municipal Court, and the officers and agents of said city, be and they are each of them perpetually restrained and enjoined from making out, certifying or attesting any tax bills against the several properties of the plaintiffs, or any of them under and by virtue of said assessments, etc."

No appeal was taken by the city from this judgment and it remains final and conclusive as to all the parties thereto.

Thereafter, Kansas City undertook to pass a supplemental ordinance No. 7539, and which is set forth in motion to dismiss writ of error and confirm judgment, at pages 8 to 10 inclusive. This supplemental ordinance simply provides that the mayor and city counselor are directed to institute and carry on supplemental proceedings to properly assess against any piece or parcel of private property within the benefit district described in Ordinance No. 3209, approved October 19, 1909, against which an assessment was in the first proceeding wrongfully made, or which was omitted to be made, the proper amount which such private property, exclusive of the improvements thereon, is benefited by the proposed improvements, such amount to be determined by the verdict of the jury in such supplemental proceedings as provided by Article 6 of the charter of Kansas City. This is all the description that was given of the property which was proposed to be assessed under the supplemental ordinance. It nowhere set out what property had been wrongfully assessed, or what property had been omitted from assessments under Ordinance No. 3209. It did not determine that a new benefit district be created but left the benefit district as it was fixed in Ordinance 3209.

The Municipal Court made an order which is set forth in the record, which stated, among other things: First, that the mayor and city counselor are hereby au-

thorized and directed to institute, carry on, and maintain supplemental proceedings to properly assess against any piece or parcel of private property within the benefit district described under Ordinance No. 3209, approved October 19, 1909, against which an assessment was in the first proceeding wrongfully made, or which was omitted to be made, etc. The order then proceeds to set out the property sought to be taken, which was forty feet off the south side of 6th Street, from Broadway to Blue Street. The order then set out the benefit district just at it was described in Ordinance No. 3209, and then proceeds as follows: "Now, therefore, you and each of you are hereby notified that the 17th day of March, 1911, at two o'clock P. M. is the day, and the Lower House Council Chamber on the 4th floor of the City Hall Building, at the southeast corner of 4th and Main Streets, Kansas City, Jackson County, Missouri, is the place fixed for empaneling a jury to properly assess against any piece or parcel of private property within the benefit district above described against which assessment was in the original proceedings wrongfully made, or which assessment was omitted to be made, the proper amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement."

On said date a jury was empaneled in said supplemental proceedings and thereafter the case was tried. At the trial of the supplemental proceedings, counsel for the plaintiffs in error in this case objected to any proceeding under the supplemental ordinance, for the

reason that the ordinance was not sufficient on its face, and did not specify any errors or defects sought to be remedied, and does not point out or specify the errors or omissions which it is sought to be corrected by said proceedings, neither does it specify the property to be taken, *or the property in the benefit district to be assessed*, and that the ordinance on its face is not sufficient; that the ordinance did not describe what pieces of property were omitted or failed to be assessed in the former proceedings; does not specify what errors or omissions were made in the former proceedings; and that the Union Pacific Railroad Company had enjoined the collection of said taxes under the original proceedings; and that the Circuit Court had adjudged the proceedings under said Ordinance No. 3209 null and void for want of notice; and that the Union Pacific Railroad Company further objected to the introduction of any testimony, because it had property within the benefit district proposed to be assessed, and that before any damages could be awarded for property taken, or benefits assessed against the property of the Union Pacific Railroad Company, it was entitled to a notice of such hearing of the proceedings, and was entitled to have a hearing in court on the question of the amount of damages awarded for property so taken and for which benefits were assessed against its property; and that the Union Pacific Railroad Company never had its day in court to be heard upon the question of the amount of damages which should be assessed for the property taken, and for which benefits were assessed

against its property, and that, in denying it such right to be heard and such right to question the award, the court was taking its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States, and the said Union Pacific Railroad Company invoked the provisions of both the Constitution of the State of Missouri, and the 14th Amendment to the Constitution of the United States, *as a shield against any assessments for benefits until said Union Pacific Railroad Company had had an opportunity to be heard upon the amount of damages that should be awarded to property owners, and the amount of benefits to be assessed against it, as provided by the charter of Kansas City, Missouri, in the original proceedings.*

The Union Pacific Railroad Company, through its counsel, maintained at that time, and ever since has maintained, that it had a right to be heard in the original proceeding upon the question of the amount of benefits to be apportioned to each piece of property in the benefit district also the amount of damages to the property sought to be taken or damaged, and also upon the question of the apportionment of benefits to be assessed against all the property in said benefit district in such proceedings, as provided by Section 3 of the charter of Kansas City and if not satisfied with such assessment it had the right to appeal to the Circuit Court and have the case tried *de novo* in that court and that it had the same rights under the supplemental proceedings.

The rule for assessing benefits in the original proceedings is as follows: "Each lot or parcel of ground to be assessed with an amount bearing the same ratio to such balance as the benefit to each lot or parcel bears to the whole benefit to all the private property assessed."

At the trial in the supplemental proceedings, the court refused to permit the plaintiffs in error to offer any evidence as to the amount of damages to the property condemned or to show the amount of benefits to the different pieces of property in the whole district *or how such benefits should be apportioned over the entire benefit district* in order that the jury might have the proper evidence to apply the ratio provided for by the charter. This was refused and the trial court instructed the jury as follows: "You have nothing to do with the assessment of the amount of compensation for the land and improvements taken or damaged. That has been done by a former jury in the original proceedings to open and widen 6th Street, the total of which amounts to $166,299.57. A part of that amount has been paid by the property owners in the benefit district whose land is chargeable therewith. Such payments are shown on the map or plat of the benefit district introduced in evidence, but there still remains a balance of such compensation amounting to $76,981.98, *which has not been paid as benefits. This balance you may assess against the city generally, including any benefit to any property of the city within the benefit district, and against such of the remaining private property, lots, tracts and parcels of*

land, exclusive of the improvements thereon, in the benefit district, as you may deem is benefited, if any, and in the proportion in which you deem the same benefited by the opening and widening of 6th Street and upon which no assessments have been paid under the original proceedings;" and, thereafter, upon the jury's request for further instructions, the court told them, "Upon your request for further instructions in regard to your duties as to assessing benefits in this proceeding, you are instructed that you *may not assess any benefits in this supplemental proceeding against any property in the benefit, district which was adjudicated in the original proceedings to have been damaged by reason of a part thereof having been taken for the widening of 6th Street from Broadway to Bluff.*"

Under this supplemental proceeding, a verdict was rendered against plaintiffs in error herein in something like $32,000.00, or approximately one-fifth of the entire benefits of the entire district.

The Union Pacific Railroad Company asked an instruction declaring the law that under the charter provisions of Kansas City, the property owners in the benefit district whose property is to be assessed to pay damages, have the right to be notified by proper and legal notice of the pendency of such proceedings to take private property, and of the benefit district in which private property will be assessed to pay such damages, and further requested the court to instruct the jury, "And you are further instructed that, in these supplemental proceedings, there was no valid notice given to the property owners

in the benefit district whose property was to be assessed to pay damages under and by virtue of the provisions of Ordinance No. 3209, read in evidence, and you are therefore instructed that to assess any benefits against property of the property owners in the benefit district under these supplemental proceedings, violates the provisions of the 14th Amendment to the Constitution of the United States, in that it is taking the defendants' property in the benefit district without due process of law, and denying to them the equal protection of the law, and you will therefore return a verdict in favor of such property owners and against the city in such proceeding." This was refused, and an exception duly saved.

The Union Pacific Railroad Company also requested the court to instruct the jury that, under the pleadings and evidence in the case, the proceedings under Ordinance No. 3209 were adjudged null and void, and of no force and effect as to the complainants in the suit of Union Pacific Railroad Company, *et al.* v. *M. A. Flynn, et al.*, introduced in evidence in the case, and that said judgment is *res judicata* upon the issues raised in said pleadings; and that the proceedings held under Ordinance No. 3209 were null and void as to the complainants mentioned in said suit of *Union Pacific Railroad Company, et al.* v. *M. A. Flynn, et al.*, for want of proper and legal notice, and there was nothing left for which the city could bring supplemental proceedings as was attempted in this case; and said company further requested the court to instruct the jury, "You will therefore return a verdict against said city and in favor of the property

owners who are parties to the said suit of the Union Pacific Railroad Company, *et al.* vs. M. A. Flynn, *et al.*"

The motion for new trial by the Union Pacific Railroad Company, and others, expressly challenged the validity of these supplemental proceedings, and challenged the proceedings under the supplemental ordinance, and plaintiffs in error claimed that they had been deprived of their property without due process of law, and denied them the equal protection of the law, in violation of the 14th Amendment to the Constitution of the United States.

The Union Depot Bridge & Terminal Railroad Company is in a different situation from the other plaintiffs in error in this case, in this, the assessment made under the original Ordinance No. 3209 was accepted by said company and paid. Thereafter, without any notice to said Union Depot Bridge & Terminal Railroad Company other than that contained in the supplemental ordinance No. 7359, and the order of publication made, as heretofore set out under that ordinance, the jury returned an assessment of benefits against its lands in the benefit district of $4,086.31. The jury, under Ordinance No. 3209, certified that they had assessed all property in the benefit district with benefits which they deemed benefited by those proceedings. The Union Depot Bridge & Terminal Railroad Company asked the court to instruct the jury that the said company was the owner of certain lands described, which are set out in the instruction, and further asked the court to instruct the jury, as follows: "The

jury are further instructed that a portion of said tracts were assessed with benefits, by reason of the improvement proposed to be made by the jury in the original proceedings had and conducted under and by virtue of Ordinance No. 3209, approved, October 19, 1909, and that the said Union Depot Bridge & Terminal Railroad Company paid, or caused the same to be paid, and that the remainder of said lands were, by the jury in the former proceedings conducted under and by virtue of said Ordinance No. 3209, found not to be benefited by said proposed improvement. You will therefore not assess said land so found by said verdict not to be benefited in said original proceedings with any benefits in these supplemental proceedings, by reason of the fact that the jury in the former proceedings found said lands not to be benefited thereby, and that said Union Depot Bridge & Terminal Railroad Company, by paying said assessment, accepted said verdict." This instruction was refused by the court and an exception duly saved.

The plaintiffs in error contend, and have contended from the beginning of the trial in the Circuit Court of Jackson County, Missouri, that they were entitled to such notice in the original proceedings as provided by Section 2 of Article 6 aforesaid, and that they were entitled to be heard in that proceeding upon the amount of damages to be assessed in such proceeding and also to offer proof as to amount of benefits to the entire benefit district and how such benefits should be apportioned over the entire benefit district in order that the jury have the proper ratio by which they could de-

termine the equitable amount of benefits to be assessed against them for property taken or damaged, and that they were deprived of such rights by reason of the fault of the city in not giving them proper notice, and that such notice was a jurisdictional fact and rendered all the proceedings null and void as against them; that in and by the supplemental proceedings, plaintiffs in error were deprived of their right to offer evidence in the original proceedings under Ordinance No. 3209, and to have one jury assess and apportion all the benefits and all the damages, and that they were entitled to be heard and offer evidence showing the ratio such benefits by reason of such improvements would bear to different properties situated in the entire benefit district; that is to say, they had the right to offer evidence to show that their property was situated over a mile from the proposed improvement, and was switch property, and would not derive as much benefit, or the same ratio of benefit, that property used for wholesale purposes would derive which was located at or near 6th Street; and that, by depriving the plaintiffs in error of this legal notice and an opportunity to be heard in that proceeding, they were compelled in the supplemental proceedings to accept the distribution of something like $90,000.00 worth of benefits over a part of this district, thus leaving the remaining part of the district to bear the burden of the entire $76,000.00 which had not been paid. They were cut off from their right of showing the proper apportionment of the amount of benefits that any property received where the assessments

had been paid under the proceedings under Ordinance No. 3209; and they were thus deprived of their right to have the benefits assessed by the supplemental jury, according to the rule laid down in Section 3 of the charter aforesaid, that is, that the jury should assess each lot or parcel of ground with an amount bearing the same ratio to such balance, after deducting the benefit to the city at large, as the benefit to each lot or parcel bears to the whole benefit to all the private property assessed.

The instruction given on behalf of the city, heretofore set out, did not require the jury to follow this ratio in assessing the benefits against property of the plaintiffs in error herein. It therefore imposed a different ratio for determining benefits upon the property owners whose property was to be assessed for benefits in these supplemental proceedings than was imposed upon the property owners who had paid assessments in the original proceedings. In this supplemental proceeding, the jury were told that so much money must be distributed over the property in a portion of the benefit district wherein the assessments made by the jury under Ordinance No. 3209 had not been paid, and that the amount was to be assessed, First, against the city generally, and then against the remaining lots and parcels of private property in the benefit district, "as you may deem is benefited, if any, and in the proportion which you may deem the same benefited by the opening and widening of 6th Street, and upon which no assessments have been paid under the original proceedings." The trial court in effect told the jury that the property of those who had not paid

the assessments made by the jury in the original proceedings, was benefited in the sum of $76,981.98, and then it told the jury how to apportion such amount, and the rule announced for apportioning such portion was not the ratio provided for in Section 3 of Article 6 of the charter. The court arbitrarily usurped the right to determine that the property in the benefit district was benefited in the sum of $76,981.98 and thereby deprived these plaintiffs in error of their right to have such question determined by the jury, and they were deprived of their right to have one jury say how much such property was benefited. They were thus cut off from having a hearing on the apportionment of the benefits over that entire district, and were compelled to accept a partial apportionment of the entire amount by the jury in the original proceedings, and the remaining apportionment fixed by the court in the supplemental proceeding. The jury were not instructed that they must assess an amount bearing the same ratio to the balance as the benefit to that lot bore to the entire benefit to all the private property assessed; and plaintiffs in error claim that therein they were deprived of their property without due process of law, and also they were deprived of the equal protection of the law, in that they were not given the same rule for measuring their liability, as was provided for by Section 3 of the charter aforesaid, and which had been applied in the original proceedings. In the original proceedings the jury determined that so much property in the benefit district was benefited so much, that is,

$89317.59, and in the supplemental proceeding the court told the jury that there was $76981.88, which you may assess against the city generally, etc., and against the private property which had not paid the assessments made by the jury in the original proceedings.

The Union Depot Bridge & Terminal Railroad Company also claimed that they were deprived of their property without due process of law in that they accepted and paid the verdict rendered by the first jury and that the jury had determined and assessed all the benefits its property would derive from such proposed proceedings, and that therefore the supplemental ordinance and the order of publication thereunder were not sufficient notice to constitute due process of law and advise them that a new assessment would be made against it in the so-called supplemental proceedings; that there was no statement in said supplemental ordinance, or in the order of publication, which advised the said Union Depot Bridge & Terminal Railroad Company that any further assessments were contemplated against its property, and that, to permit the jury in the supplemental proceedings to re-examine the benefits accruing under the said proceedings and assess its property with benefits herein, violated the 2nd Clause of the 7th Amendment to the Constitution of the United States, in that it permitted a re-examination of the same facts before a second jury without any notice to it, that said examination was going to be had, or that any hearing was going to be had as to the benefits to be charged to its property, or that any benefits would be assessed

against its property in the supplemental proceedings, or that there had been any omissions in the first assessment, or that there had been any erroneous assessment made by the jury under Ordinance No. 3209, and that it, having accepted the assessment made by said jury under said first ordinance, that the questions could not be re-examined by a jury under said supplemental proceedings without violating the 7th Amendment to the Constitution of the United States, and it claimed also that said proceedings violated the 14th Amendment to the Constitution of the United States, in that it was taking its property without due process of law.

See *C. B. & Q. R. Co.* v. *Chicago*, 166 U. S 226.

All the plaintiffs in error herein contend that said supplemental ordinance was so vague, uncertain and indefinite, and the said order of publication thereunder was so vague, uncertain and indefinite, as to the plaintiffs in error, that any assessment thereunder against their property does not constitute due process of law, and that the proceedings held thereunder deny to them the equal protection of the law. These rights were claimed in the trial court and again in the Supreme Court of the State of Missouri, and that court denied such claims, and a writ of error is prosecuted to this court, and the plaintiffs in error claim, First, That the question was properly raised that said supplemental proceedings did not constitute due process of law as to these plaintiffs in error, and denied to them the equal protection of the law; and that as to the Union Depot Bridge & Terminal Railroad

Company, the said proceedings also violated the 2nd Clause of the 7th Amendment to the Constitution of the United States; and that a federal question was properly raised and that the writ of error should not be dismissed, and that there are merits in the contention for the plaintiffs in error, and the motion of the defendants in error to affirm the judgment should be overruled and the motion to affirm the judgment denied.

BRIEF OF PLAINTIFFS IN ERROR.

I.

This is a condemnation suit brought by Kansas City, under its charter provisions to condemn a strip of land forty feet in width on the south side of Sixth Street in Kansas City, and extending from Broadway to Bluff Street.

Such proceedings are in derogation of common law and common right and the utmost strictness is required in order to give validity to them.

Ellis v. *Railroad*, 51 Mo. l. c. 203.
Whitley v. *Platt Co.*, 73 Mo. 30.
Zimmerman v. *Snowden*, 88 Mo. l. c. 220.
Henderson v. *Pemberton*, 89 Mo. l. c. 65.
C. R. I. & P. Ry. Co. v. *Young*, 96 Mo. l. c. 42.
City of Tarkio v. *Clark*, 186 Mo. l. c. 218.

II.

In such proceedings property owners whose property is sought to be charged with benefits to pay damages for property taken or damaged are entitled to notice and opportunity to be heard at some stage of the proceedings in order to constitute due process of law.

St. Louis v. *Rankin*, 96 Mo. l. c. 505.
St. Louis v. *Brinckwirth*, 204 Mo. 302.
Davidson v. *New Orleans*, 96 U. S. 97.
Hagar v. *Reclamation District*, 111 U. S. 701.
Londoner v. *Denver*, 210 U. S. 373.

III.

Plaintiffs in error contend that they are deprived of their property without due process of law in this supplemental proceeding for the reason they were deprived of the right and opportunity to be heard as to the original apportionment of benefits among all the property owners in the benefit district and the court held them bound by the verdict of the former jury upon that portion of the benefits which had been paid by certain property owners in the benefit district. The plaintiffs in error never had opportunity to be heard as to the original apportionment made in the original proceedings and find themselves now practically bound by such apportionment as between their lots and those of the owners who paid although the former proceedings had been adjudged null and void by the Circuit Court, and for the further reason no legal notice was given them of such proceedings as required by the Charter of said City and they were deprived of a right to be heard upon the trial of what was the amount of damages to property taken and the equitable apportionment of benefits over the benefit district in accordance with the ratio fixed in Section 3 of Art. 6, and that the trial court by its instruction declared that that portion of land in the benefit district was benefited in the sum of $76,981.88, while the property owners who paid the assessments made by the jury in the original proceedings were given a trial by jury and the jury determined that their property was benefited only $89317.59. So that the amount of benefits in the supplemental proceeding, was fixed by the court and not

by the jury, and the jury had nothing to do but apportion that sum over that part of the benefit district which had not paid any assessment. They were not allowed to say whether the $89317.59 had been properly and equitably apportioned, neither were plaintiffs in error allowed to introduce any proof on that subject. The charter provisions of Sec. 3, Article VI of the Charter of Kansas City expressly provides as follows:

> "Parties interested may submit evidence to the jury and the latter shall examine personally the property taken, damaged and assessed."

In order to understand the contention of plaintiffs in error it is necessary to set out the provisions of the Charter of Kansas City under which this proceeding was conducted.

> Sec. 2. *Description of Property Taken or Damaged—Benefit Limit—Plat, Description and Names—Date Fixed for Empaneling Jury.*—When any ordinance shall provide for taking or damaging private property for any public use specified in the preceding section, the city shall by ordinance describe the private property to be taken or damaged, and if the same is to be paid for wholly or in part by special assessments, shall prescribe the limits within which private property shall be deemed benefited by the proposed improvement, and be assessed and charged to pay compensation therefor; and thereupon the city engineer or one of his assistants shall make out and deliver to the clerk of the Municipal Court a statement by plat, map or otherwise, containing a correct description of the several lots or parcels of private property to be taken or damaged, with the respective names of the owners and parties interested therein so far as

known, who may be such at the time said ordinance takes effect. Said court shall thereupon, by order, appoint a day and place for empaneling a jury to ascertain the compensation for the property to be taken or damaged and to make assessments to pay for the same, which order shall recite the number and title of said ordinance with the date when it took effect, and contain a description of the property proposed to be taken or damaged as contained in said ordinance and also a description of the property contained in the benefit district as described in said ordinance, and naming the day and place fixed by said court for impaneling a jury to ascertain the compensation for the property to be taken or damaged and to make assessments to pay for the same, which order shall be directed to all persons whom it may concern, without naming them.

Sec. 3. *Compensation for Private Property Used or Damaged—How Paid—Interested Parties May Appear—Jury to Examine Property—Removal of Improvements—Verdict, Signing and Form of—Duties of Engineer and Assessor.*—To pay such compensation the jury shall assess against the city the amount of benefit to the city and public generally, inclusive of benefit to any property of the city, and the balance of such compensation they shall assess against the several lots and parcels of private property within the benefit district, exclusive of the improvements thereon, deemed benefited by the proposed improvement as determined according to the preceding section; each lot or parcel of ground to be assessed with an amount bearing the same ratio to such balance as the benefit to each lot or parcel bears to the whole benefit to all the private property assessed. *Parties interested may submit evidence to the jury and the latter shall examine personally the property to be taken, damaged and assessed.* The party owning

any property taken may remove any improvements thereon, and the jury may consider this fact in determining their verdict. The verdict of the jury shall be signed by each juror and delivered to the Municipal Court and shall contain a correct description of each lot or parcel of private property to be taken and the value thereof, and of each lot or parcel of private property damaged and the amount of injury thereto, and also the amount assessed against the city, together with a correct description of each lot or parcel of private property assessed and the amount assessed against the same. The City Engineer and City Assessor or their assistants shall, when required, aid the jury to put their verdict in proper form, and the jury shall not be discharged until the Municipal Court is satisfied that the verdict is correct in form.

Sec. 6. *Appeal to Circuit Court.*—In case the city, or any person affected by the proceedings, either as the owner thereof or interested in any of the property taken or damaged, or as the owner of, or interested in any of the property assessed, shall feel aggrieved by the verdict of the jury, such party so aggrieved may, within twenty days from the time the verdict of the jury is confirmed, appeal to the Circuit Court of Jackson County, Missouri, at Kansas City. * * *; and thereupon the said Circuit Court shall become possessed of the cause, and said cause, unless dismissed, shall be tried *de novo* in said Circuit Court and have precedence over all other causes for trial.

Sec. 23. *Defective Proceedings—Supplemental.*—When by reason of any error, defect, or omission in any proceedings, or in the verdict or judgment therein that may be instituted under the provisions of this Article, a portion of the private property sought to be taken, or some interest therein, cannot be acquired, or any assessment is made against private property which cannot be enforced

or collected, or when, by reason of any such defect, private property in the benefit district is omitted, the city may, by ordinance, institute, carry on and maintain supplemental proceedings to acquire the right and title to such property or interest therein intended to be taken by the first proceeding, but which cannot on account of such defect, error or omission, be acquired thereunder, or to properly assess against any piece or parcel of private property against which an assessment was in the first proceeding erroneously made or omitted to be made, the proper amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement to be determined by the verdict of the jury in such supplemental proceedings; and the original assessments may be revived, corrected, increased or diminished as may be necessary or equitable under the provisions of this Article for the original proceedings. Such supplemental proceedings shall be instituted and conducted as to the particular piece or pieces of private property sought to be acquired or assessed in like manner and with like effect as in the original proceedings, and shall be known and described as supplemental proceedings for the purposes specified in the original ordinance; and a supplemental verdict and assessment shall be made, confirmed and copies of the original verdict certified in every particular as in the original proceedings; and the assessments as established and corrected by such supplemental verdict shall be collected by the City Treasurer in the same manner and under like conditions and restrictions, powers and duties as in the case of original proceedings.

The court will observe by Section 2 aforesaid, that the court in which proceedings is begun shall make an *order* appointing a day and place for selecting the jury to ascertain the damages and make assessments to pay

for the same, which order shall recite the title of the ordinance, when it took effect and shall contain a description of the property to be taken; also, a description of the property to be assessed for benefits; *and which order shall be directed to all persons whom it may concern without naming them.* Section 2, also, prescribes *that said order shall be published for four consecutive weeks in some newspaper doing the city printing.*

The next section provides that each lot or parcel of ground shall be assessed with an amount *bearing the same ratio to such balance as the benefit to each lot or parcel bears to the whole benefit to all the private property assessed. Parties interested may submit evidence to the jury and the latter shall examine personally the property to be taken, damaged and assessed.*

Section 6 provides that the *owner of or any one interested in property assessed, if he feels aggrieved by the verdict of the jury may within twenty days after the rendition of the verdict and its confirmation appeal to the Circuit Court of Jackson* County, Missouri, and, thereupon, the said Circuit Court shall become possessed of the said cause and unless said cause is dismissed it *shall be tried de novo.*

The entire proceedings constitute but one action in court. The Supreme Court of Missouri in the case of *State ex rel Holden* v. *Hill*, 84 Mo. 248, passed upon this point and held that although the scheme adopted in such cases combined both the power of eminent domain and the taxing power in one and the same proceedings they expressly held there was only one cause of action.

"If one of a hundred property holders appeal, however well satisfied with the verdict the other ninety-nine may be, *the entire cause, by that appeal, is taken to the Circuit Court. It is but one cause, although in the proceeding each of a hundred parties has a distinct assessment for the compensation he may be entitled to, or the charge for benefits for which his property is liable. There is but one jury, one verdict, and one judgment. That judgment ascertains and determines the compensation to be paid to each person whose property is taken, and the amount of charge against each lot or parcel for benefit received, but it is nevertheless only one judgment. An appeal from the Circuit to the Supreme Court brings up the same cause that was tried in the Circuit Court and a reversal of the judgment is a reversal of it as an entirety.* * * So far as the latter are concerned the proceeding is designed to make an equitable apportionment of charges for benefits. It is one proceeding, not many, one judgment and not several."

In the case of *Kansas City* v. *Mulkey*, 176 Mo. l. c. ....., it is said:

"An appeal was taken by two of the parties interested in the result of that proceeding, and these appellants as defendants therein though not appealing are equally bound by the result of that appeal as though they had joined therein. This court has held in cases of this character that, upon a reversal, *the whole verdict and judgment is set aside even though one person only prosecuted his or her appeal and the assessment of damages there made to each individual defendant as his or her interest in the property to be taken was made to appear, and that a new trial must be had as to all defendants upon the issues of the value of their property sought to be condemned.*"

In the case of *Kansas City* v. *Hennegan*, 152 Fed. 249, in speaking of the Kansas City Charter, it is said:

> "The construction of Section 3 of said charter was directly involved in the case before the Supreme Court of Missouri. The substantive effect of that construction *was that the condemnation proceeding against the various defendants presented the case of an indivisible unit to be tried by one and the same jury, unless trial by jury be waived and the jury must pass upon and make award as to the amount of damages for each and every piece of land taken or damaged and determine the benefits to be assessed against each piece of property within the benefit district. The whole finding must be embraced in one judgment. So much so is the judgment a unit it was held not only that in the event of an appeal by a single defendant from the award in the mayor's court the whole case including each separate piece of property involved, must be gone over and tried de novo, but, also, that if any error be committed in the progress of the trial in the Circuit Court prejudicial to the interests of any one of the various defendants suing out a writ of error, for which the judgment should be reversed, the reversal operates as a vacation of the entire judgment, necessitating, on remand, a trial de novo of the whole case from beginning to end, both as to the re-ascertainment of the amount of damages sustained by each owner whose property is taken or damaged, and the re-ascertainment and re-adjustment of the benefits to be assessed against each tract or parcel of land within the benefit district. * * * And each party to be assessed for benefits is interested and concerned in seeing that as little damages as possible are assessed for the property to be taken; for in the proportion of the diminution of the fund to be paid are the burden of the subjects of assessment for benefits lessened.*"

Section 2 of the Charter of Kansas City provides:

> *"Any person having an interest in the real estate to be affected by the proceedings may upon application and entering their appearance be made parties thereto; but no notice of said proceeding shall in any case be necessary to the validity thereof, except the publication of the order as herein provided. Notice so given by publication shall be sufficient to authorize a court to hear and determine the case and to make any finding or order or render any judgment therein as fully as though all the parties interested at the time of taking effect of such ordinance or any time thereafter had been sued by their names and personally served."*

It is clear from the foregoing provisions that there is but one proceeding contemplated by the Charter of Kansas City, there is but one ordinance, one order of court—and that order is published to all whom it may concern without giving their names—one trial before one jury to hear and determine the amount of damages and to assess the benefits to pay the damages, and the charter requires but *one order of publication*, and it also, provides that *notice so given by publication* shall be sufficient to authorize the court to hear and determine the case, etc. That order of court fixes but one time for hearing all parties concerned. It does not fix one time for hearing property owners whose property is sought to be taken, and another time for hearing persons in the benefit district whose property is to be assessed benefits. There is but one proceeding before one jury where all the property owners are heard upon the question of damages for property taken and the same jury in

the same proceeding hears all persons interested in the benefit district whose property would be assessed for benefits in such proceedings; and the charter contemplates that the same notice by publication shall be given to all persons whose property is taken or damaged in the proceeding or whose property is assessed benefits to pay for such damages.

It is conceded in this case that there was no valid notice by publication of the court's order under Ordinance 3209 given to the property owners in the benefit district. This issue was squarely decided in the case of *Union Pacific Rd. Co.* v. *Kansas City et al.*, tried in the Circuit Court of Jackson County, Missouri, wherein it was found by the trial court that "none of said plaintiffs were served with notice or process of any kind in said proceedings in the municipal court; that none of said plaintiffs had any knowledge thereof or opportunity to be heard therein; that none of said plaintiffs entered appearance therein in person or by agent or attorney; and none of them had any knowledge of the finding of said proceedings till long after the verdict therein had been rendered and confirmed and judgment thereon entered and the time within which appeals might be taken therefrom had expired. * * * And the court further finds that proceedings, verdict, confirmation thereof and judgment is as to these plaintiffs and each of them and as to their respective properties inoperative and of no effect, and that the several assessments undertaken to be made and levied upon the plaintiffs' said properties are void and that said municipal court, in said

proceedings, had and acquired no jurisdiction therein of the plaintiffs or any of them or of their said properties. It is, therefore, considered, ordered, adjudged and decreed by the court that said assessments, insofar as they affect or purport to affect plaintiffs or any of them, or any of their several properties, be and the same are hereby annuled and for naught held; that the several assessments against the respective properties, aforesaid, of the plaintiffs and each of them be and the same are hereby set aside and annuled."

And the defendants in that case were perpetually restrained and enjoined from making out, certifying or attesting any taxbills against the several properties of the plaintiffs, or any of them, under and by virtue of said assessment. There was no appeal from this judgment and the issues adjudicated therein are final as to all the parties to said suit.

It was found by the court in that proceeding that the plaintiffs in error in this proceeding had no notice of the pendency of said proceedings and that the said proceedings were null and void as to them, yet the court in the supplemental proceedings held that the plaintiffs in error were bound by the several assessments made by the jury in that proceeding, which had been paid by the property owners owning the property against which said assessments were made. That is to say, property owners against whose property benefits had been assessed in a round sum of $89317.58 and who had paid the same were valid as against these plaintiffs in error, and, also that the amount of damages assessed

in said proceeding was binding on these plaintiffs in error. The court by its instruction to the jury told them that the former jury had assessed over $166,000 and that this jury had nothing to do with the assessment of damages. The court, also, told the jury that $89317.58 of benefits assessed by the former jury had been paid and that the jury in the supplemental proceedings could not make any assessment of benefits against this property which had paid that amount of benefits. The court told the jury that there was a balance of $76,981.98 of benefits which had not been paid and this balance the jury will assess against the city and the remaining private property in the benefit district "as you may deem is benefited, if any, and in the proportion in which you may deem the same benefited, and upon which no assessments have been paid under the original proceedings." And, upon the jury's further request, the court told them:

> "Upon your request for further instruction in regard to your duties as to assessing benefits in this proceeding you are instructed *that you may not assess any benefits in this supplemental proceeding against any property in the benefit district which was adjudicated in the original proceeding to have been damaged by reason of a part thereof having been taken for the widening of Sixth Street from Broadway to Bluff.*"

The trial court by its instructions told the jury that they had to accept $76,981.98 as the remaining part of benefits unpaid and they should divide this amount and apportion it against the property in this benefit dis-

trict which had paid no assessments, first by deducting the general benefit to any property of the city within the benefit district, and then assess the remainder against the remaining private property, lots, tracts and parcels of land in the proportion which the jury deemed such property benefited and in the proportion "which you may deem the same benefited by the opening and widening of Sixth Street *and upon which no assessments have been paid under the original proceedings.*" The jury in this supplemental proceeding were not allowed to consider any benefits of said proceeding to property sought to be taken but they had to accept the assessment of benefits upon such property by the jury in the original proceedings. The court thereby decided that the apportionment of benefits by the jury in the original proceedings to that portion remaining of the property not taken, was just and equitable, also, that the apportionment of benefits by the jury in the original proceeding which had been paid was also just and equitable, and the plaintiffs in error were cut off from this right of showing such apportionments were not just and equitable. Under the charter provisions the jury are required to assess the damages to the property taken, also the benefits to the remaining portion of said property not taken by said proceedings (see *Kansas City* v. *Morton*, 117 Mo. 446), and the greater the benefits are assessed against the property taken the less there will be to assess against the remaining property taken or damaged. But as the former jury had passed upon the amount of benefits to be assessed against property damaged the jury were ex-

pressly instructed by the trial court that they could not assess any benefits to the property taken or damaged because that had been done by the other jury. The plaintiffs in error were thus compelled to accept the verdict of the former jury as to a part of the benefits to be assessed, although they were not parties to that proceedings and not bound by said verdict.

The jury in the supplemental proceedings were not allowed to assess benefits against any property in the benefit district which was adjudicated to have been damaged in the original proceedings nor against any property where benefits had been paid which were fixed by the former jury. No benefits could be assessed against any property holder who had paid assessments under the original proceedings, no matter if the jury in the supplemental proceedings did think the assessment of benefits against the property which had paid assessments under the original proceedings were insufficient. The jury were prohibited from changing or modifying those assessments in any way, shape or form. The plaintiffs in error in this case were also deprived of the benefit of the rule laid down in the charter itself for assessing these benefits.

Under the original proceedings the plaintiffs in error had the right to be heard before a jury in the original proceedings which assessed the benefits to all the property in the benefit district. It is immaterial that under the Charter of Kansas City, the proceedings to assess benefits is in the exercise of the taxing power and not the power of eminent domain. It is not a question of

the kind of power or the source of the power, but it is the way in which that power has been exercised that plaintiffs in error complained. There is no separate hearing provided by the charter for the property owner whose property is taken or damaged and another hearing for the property owner whose property is to be assessed benefits to pay for such damages. The scheme for condemning private property for public use under the charter of Kansas City combines the exercise of both the above branches of government in one hearing. And Section 3 of the charter expressly provides:

> "That parties interested may submit evidence to the jury and the latter shall examine personally the property to be taken, damaged and assessed."

There is no limitations placed by this provision upon the kind of evidence the parties may submit, and it has been the constant practice of property owners in the benefit district to submit evidence both as to the value of the property sought to be taken and the benefits accruing to all the property in the benefit district. And Section 6 of the charter, above quoted, expressly gives any owner, or anyone interested in any of the property assessed, the right to appeal from the verdict in the municipal court to the circuit court, where the case shall be tried *de novo*. And in the circuit court the entire proceeding is gone over both as to the amount of damages awarded and the particular benefits assessed. See authorities cited, *supra*. Any property owner in the benefit district can take an appeal to the Supreme Court,

and, if he is the sole appellant in the Supreme Court, he may compromise his appeal and dismiss the same, and, if he does it leaves the verdict valid and binding against all those who did not appeal but whose property has been taken and those whose property has been assessed.

See *Mulkey* v. *Kansas City*, *supra*.

This right of the parties to introduce proof was denied the plaintiffs in error in this proceeding and the Supreme Court of the State of Missouri does not allude to the above paragraph in Section 3, which gives all parties in interest the right to submit evidence. The Supreme Court, evidently, overlooked that provision in the charter in the opinion rendered by that court in this case. Under this charter provision it made no difference how much benefit the property of plaintiffs in error derived from said proceedings they were required to pay only such an amount bearing the same ratio to the balance remaining after the city's benefits have been deducted as the benefit to their lot or tract bore to the whole benefit to all the private property assessed. That is to say, the proceeding might benefit the property one hundred dollars, yet the proportion of benefits to such property compared with the entire benefits to all the private property might not be over twenty-five dollars. Therefore, in order to do equal and exact justice to all property owners in the benefit district, each property owner is entitled to have the ratio provided in Section 3 used

in determining the amount of benefits his property shall be assessed. That rule was denied to these plaintiffs in this supplemental proceeding. The instruction already quoted did not announce any such rule to be applied by the jury herein. Indeed, the court could not apply such rule because the jury were not allowed to find the whole benefits and then determine the ratio between the benefits to the property of the plaintiffs in error and the benefits to the whole property. But, on the contrary, the jury were told that there remained $76,981.98, which had not been paid, and from this balance they were first to deduct the benefits to the city and then assess the balance against the remaining private property in the benefit district "as you may deem is benefited, if any, *and in the proportion in which you may deem same benefited by the opening and widening of Sixth Street*, upon which no assessments have been paid under the original proceedings." The plaintiffs in error were therefore, discriminated against by the city in applying the rule for measuring the benefits to their property. The court utterly ignored this charter provision, which laid down the rule for determining the amount of benefits to each owner of private property to be assessed, and this rule was denied to the plaintiffs in error without any fault of theirs and it took away from them the right to be heard upon the entire amount of benefits to each and every piece of property in the benefit district. The jury, in order to ascertain the benefit to the property of plaintiffs in error, should have determined, first, the entire benefits to all the property

in the benefit district, and, then, the amount of benefits to each particular lot or parcel of ground based upon the ratio which the benefits to that lot bore to the whole benefit to all the private property in the benefit district.

Again, in determining the total amount of benefits in the district, the jury should have been required to find what benefits accrued to the property taken or damaged. The jury must, first, determine the amount of damages which accrues from taking the property sought to be condemned. After ascertaining this amount the jury then ascertains the amount of benefits which that property or the remaining part of such property will receive from such improvements.

See *Kansas City* v. *Morton*, 117 Mo. 446.

The court by its instruction, in this case, told the jury that they could not consider and assess any benefits to the property sought to be taken under Ordinance 3209. The court, also, told the jury that they could not assess any part of this $76,981.98 upon any part of the property where benefits had been assessed by the jury under Ordinance 3209, and paid by the property owner. It made no difference that the jury in this supplemental proceedings believed that the assessments were too low on the property which had been assessed for benefits in the former proceedings, or that the apportionment of benefits over the entire district was unjust and inequitable, if the assessments had been paid by the owners thereof, the jury could not rectify or

change those assessments and the plaintiffs in error had to accept such assessments. And when plaintiffs in error, by their counsel, attempted to show the inequality and injustice of part of the assessments, which had already been paid, the court refused to permit any evidence relating to such assessments. For instance, this record shows the following:

> "Q. Mr. Healy, can you tell from this record what amount of benefits were assessed against the Gregory Grocery House over here at the corner of Delaware and 3rd Street?
>
> Mr. Petherbridge: We object to that because it is incompetent if it was paid. If that assessment has been paid the Supreme Court says that that is *res judicata* and I understand it has been paid.
>
> The Court: And if it has not been paid, then this jury will have to reassess it.
>
> Mr. Petherbridge: Yes, sir.
>
> The Court: I don't think that is material.
>
> Mr. Watson: I want to show that, to show the inequality and injustice of that assessment. They only assessed four or five dollars against that concern and they assessed property two or more miles away as high or higher than they did this wholesale grocery house down at 3rd and Main.
>
> The Court: If that has been paid the jury may not inquire into it."

The plaintiffs in error in this case were required to accept the apportionment of more than one-half of the entire benefits in this district made by the jury under Ordinance 3209, when it was shown in evidence at the trial in the Circuit Court of Jackson County that no notice was given to these plaintiffs in error of

such proceedings, as required by the charter, and that said proceeding as to them was null and void. Yet the court in this proceeding held them bound by the proceedings under Ordinance 3209 in the apportionment of over one-half of the entire benefits, and then the court compelled the jury to assess the remaining sum upon the property of these plaintiffs in error and other property owners who had not paid the assessments made by the former jury. And plaintiffs in error contend that this deprived them of their rights of defense and their right to be heard in court upon the distribution of these benefits over the entire district, because the distribution of these benefits over the entire district was of vital concern to each property owner therein and important in determining the proportion of benefits which should be assessed against each individual tract in the benefit district. That plaintiffs in error were prejudiced by not following such rule is evidenced by the verdict of the jury in this supplemental proceeding. And, especially is it emphasized in the Union Depot Bridge & Terminal Railroad Company assessment.

The plaintiffs in error were also compelled to accept the assessment of benefits made by the former jury against the property which was partly taken for the purpose of widening Sixth Street. They had a right to offer evidence as to the benefits to that part of the property remaining after taking this strip of ground forty feet in width, and the assessment of the benefits to the remaining portion of the property, not so taken, affected their rights and the amount of assess-

ment against their property, the greater amount of benefits assessed to the remaining portion of the property sought to be taken the less the assessments would be to the remaining property in the benefit district. This right was denied to the plaintiffs in error in this case. They were, also, denied the equal protection of the law in that they were denied the right of having the benefits determined according to the ratio of assessment, fixed by Section 3 of the charter, and thus they were denied equal protection of the law. They were entitled to have their property assessed by a jury by the same rule that was applied to the original proceedings in assessing benefits to each and every piece of property in the benefit district. Here they were cut off from that right without any fault of theirs, and, in doing so, the city denied to them the equal protection of the provision of Section 3, providing the ratio for the assessment of benefits.

The plaintiffs in error contend that they were denied due process of law and equal protection of the law in each and all of the foregoing respects. It is admitted that they were denied the legal notice required to be given them by Section 2 of Article 6, aforesaid. They were not given the same rights under the supplemental proceedings that they were entitled to in the original proceedings under Section 2 of Article 6, aforesaid, and herein they were denied due process of law. They were denied the ratio for assessing benefits provided by Section 3 of Article 6, aforesaid. They were here held to be bound by the verdict of the jury

in the former proceedings in proportioning over $89,000 of benefits when they were not a party to such proceedings, and when such proceedings already had been adjudicated null and void. They were, therefore, denied a right herein provided for by the charter, and such denial deprived the plaintiffs in error of their property without due process of law.

It has been adjudged by this court, in the case of *Pritchard* v. *Norton*, 106 U. S. 124, that a denial of a right of defense under the law was a denial of due process of law. The case of *Goodrich* v. *Detroit*, 184 U. S. 432, does not reach the question involved in this case. In that case the law of Michigan expressly provided for two hearings. In the first hearing the damages were assessed and the property owners were not required to be made parties thereto. They had a hearing at the second proceeding to apportion the costs and the court held that such hearing was not a denial of due process of law.

We think this case is governed by the decision in the case of *Spencer* v. *Merchant*, 125 U. S. 345. An assessment had been declared valid by the Supreme Court of New York in 100 N. Y. 585, and the case was brought to this court by a writ of error. A decision involving a prior assessment had been declared void in the case of *Stewart* v. *Palmer*, 74 N. Y. 183. Thereafter in 1881 the legislature passed an act assessing a sum equal to so much of the original assessment as remained unpaid, adding a proportional part of the expense of making that assessment, interest, etc. The legislature provided that the assessment should be levied and equitably ap-

portioned by the supervisors of the county upon and among the lots which had not paid any assessments after public notice to all the parties interested to appear, etc. The Court of Appeals of New York held the statute valid upon the ground that the legislature was supreme in its power of taxation and that it had the power to determine the amount to be assessed and the property which was especially benefited by such proceedings. The legislature of New York determined, as a matter of fact, that the lands were benefited so much, and left the apportionment to certain appraisers. The Court of Appeals of New York said that the power of taxation by the legislature was unlimited so long as it was exercised for public purposes, and that the legislature itself had a right to make a reassessment describing the benefit district and the amount it would be benefited. The Court of Appeals held that no hearing would alter the decision of the legislature or be of any avail to review or change it. This court, in affirming that judgment, said:

> "That the power to tax belongs exclusively to the legislative branch of the government."

And, again:

> "That the legislature in the exercise of its power of taxation has the right to direct the whole or a part of the expense of the public improvement, such as laying out, grading, or repairing a street to be assessed upon the owners of land benefited thereby and the determination of the territorial district which should be taxed for local improvement, is within the province of the legislative decision."

This court further held, that, in the statute of 1881, the legislature itself determined what lands were benefited and should be assessed, and that inasmuch as the legislature had determined that question, no hearing could change that determination and therefore the statute of New York, in question, was not unconstitutional. There was a dissenting opinion by Justice Mathews and Justice Harlan. The dissenting opinion says:

> "By this act, therefore, the owners of the land in question were deprived of the opportunity of being heard upon the question, whether the apportionment as between them and the other land owners embraced within the original assessment district for the same improvement was equitable and fair. They were, therefore, deprived by the act of 1881 of the very thing of which they were deprived by the act of 1869 on account of which the Court of Appeals of New York held the latter act to be unconstitutional and void."

This case clearly holds that the contention of the plaintiffs in error in this case raises a federal question; that a judgment of the highest court of a state, sustaining the validity of assessment upon land under a statute of the state or municipal charter, which was alleged to be unconstitutional and void because it afforded the owners no opportunity to be heard upon the whole amount of the assessment, involves a decision against a right claimed under the Fourteenth Amendment to the Constitution of the United States prohibiting the taking of property without due process of law and may be reviewed by this court on writ of error, although the constitution

of the state contains a similar provision and no constitutional provision is specifically stated in the record of the state court.

In the case at bar the plaintiffs in error claim that the proceedings under the supplemental ordinance, which were authorized by the Charter of Kansas City, were void because it afforded to these property owners no opportunity to be heard upon the whole amount of the assessment, and it, also is void because the court could not apply the ratio in determining the amount of benefits to be assessed against their property, which is provided for in Section 3 of Article 6 of the Charter of Kansas City, Missouri. The plaintiffs in error contend that the case of *Spencer* v. *Merchant* is, also, authority in their favor for the reason that there is a distinction between the proceeding in this case and the proceeding in the case of *Spencer* v. *Merchant, supra.* There is a clear distinction between a proceeding where the state legislature itself fixes a tax and also prescribes upon what property the same shall be assessed, and a proceeding in a court where the court must ascertain the amount of benefits and the distribution of the same according to rules prescribed by the law-making power. In the first instance, there is no provision for a hearing, as a hearing would not avail anything because the legislative power is supreme. In the second instance, the tribunal acts in a judicial capacity and a hearing is prescribed and given to the property owners.

See case of *Davidson* v. *New Orleans*, 96 U. S. 97.

Hagar v. *Reclamation District*, 111 U. S. 701.

Londoner v. *Denver*, 210 U. S. 385.

The proceeding provided by the Charter of Kansas City belongs to that class where the proceeding is of a judicial nature. This case is, therefore, clearly distinguished from the Act of the Legislature in the case of *Spencer* v. *Merchant*. In this case the original ordinance prescribed and fixed the benefit district within which private property should be assessed. A proceeding was had under that ordinance but no proper hearing was given to these plaintiffs in error and the assessments made under such proceeding were held null and void. Thereupon, the city undertook to correct such assessment by a supplemental proceeding under Section 23, heretofore quoted.

In the case of *Stewart* v. *Palmer*, 74 N. Y., 183, it was held that a state statute providing for certain local improvements and for the assessment of benefits to pay therefore, did not provide for due process of law, and was therefore unconstitutional.

In the course of the opinion in that case, the court unhesitatingly announced that the persons to be assessed with benefits have the unequivocal right to have the benefits justly apportioned between property owners within the benefit district, and that if one property owner is required to pay more than his fair proportion, his property is taken without due process, for the benefit of others. The court says (page 189):

> "But in all cases there must be apportionment of the burden, either among all the property-owners of the state, or of the local division of the state, or the property owners specially benefited by the improvements. In either case, if one is required to pay more than his share, he receives no corresponding

benefit for the excess, and that may properly be styled extortion or confiscation. A tax or assessment upon property arbitrarily imposed without reference to some system of just apportionment could not be upheld.

Assessments for local improvements can be justified only upon the theory that the lands upon which they are laid are specially benefited by the improvement, for which they are laid and hence ought to bear the burden rather than property generally; and if a law should authorize such assessments to be laid, without reference to benefits, it would either take property for the public good, without compensation, or it would take property from one person for the direct benefit of another, and in either aspect it would be unconstitutional * * * *Taxation and assessment imply apportionment. Each person must share the burden of taxation and assessment equally with all others in like situation.*"

The court will observe that the common council in and by the supplemental ordinance did not create a new district and embrace in that district only the property owners who had not paid assessments made under the original proceedings, but the common council adopted same district provided for in Ordinance 3209. Ordinance 7539 simply refers to the benefit district prescribed under Ordinance 3209. There was no particular property mentioned or described in said supplemental ordinance upon which benefits should be assessed. The Supreme Court of Missouri, in construing the meaning of Section 23, said:

"Thus, for example, if proceedings had been regular in the municipal court with reference to ascertainment of damages for property taken, and irregular with reference to assessment of benefits

> in the benefit districts, the supplemental proceedings would have been directed solely to the correction of the error in the assessing of benefits and the judgment in the original proceeding would be cured by the correction of that judgment in the supplemental proceeding."
>
> *State ex rel.* v. *Seehorn*, 246 Mo. l. c. 577.

We, therefore, contend that the decision in the case of *Stewart* v. *Palmer*, 74 New York 183, is in point in this case. Here no legislative body declared that only the property in the benefit district, which had not paid assessments, would be benefited by the proposed supplemental proceeding, but the court in its charge to the jury told it that it had nothing to do with the assessment of damages and that $89,317.58 of the benefits assessed by the jury under the original proceedings had been paid and it could assess no benefits against the property where such assessments had been paid. The court, also told the jury that it could not assess any benefits against the property taken or damaged, because that had been done by the former jury. The court, by such proceeding, compelled the complainants herein to accept the ascertainment made by the former jury, of which proceeding they were not notified, as required by the charter; and they were, also, required to accept the apportionment of the jury in the original proceedings to the extent of $89,317.58, although they were not notified of such assessment at the time the same were made, but were deprived of their right to heard upon such apportionment, which is expressly provided for in Section 3 of Article 6 of the Charter, aforesaid. They were, also, deprived of the

proper rule or ratio laid down in Section 3, aforesaid, for determining the amount of benefits to be assessed against their property. In each of these respects the supplemental proceeding was of a judicial character and the complainants herein, according to the decision of the Supreme Court of Missouri, in the case of *State ex rel.* v. *Sechorn, supra*, were entitled to all the rights accorded to those whose property was assessed or taken in the original proceedings. By the construction given Section 23, aforesaid, by the Supreme Court, the plaintiffs in error were denied the right to be heard and offer proof as to the apportionment of benefits over the entire district and how those benefits should be apportioned over that part of the district which had already paid assessments, as well as that part which had not paid assessments. That right, undoubtedly, they had under the original proceedings.

We think the case of *Londoner* v. *Denver*, 210 U. S. 373, is also in point. In this case the city clerk had published a notice *inter alia*, that, if the property owners would file objections to such proceedings within thirty days the city council would hear and determine such objections before the passage of any ordinance assessing the cost. The plaintiffs in error in that case, within thirty days, filed a notice setting forth various objections to the proceedings. After this notice was filed, the city council met as a board of equalization, and, without hearing any evidence from the property owners making objections, adopted a resolution reciting that various persons as owners of real estate had filed complaints against the assessments for the cost of said

pavement but the council found no complaint or objection had been made against the proportionment of said assessment made by the board of public works, and the said council, therefore, affirmed and approved the proportionment of said assessments made by the said board of public works, and without any further hearing or notice to the property owners, the said council enacted the ordinance of assessment, whose validity was questioned in the above case by the property owners in the benefit district. The case went to the Supreme Court of Colorado and that court held the proceeding was valid, and on writ of error the case was taken to the Supreme Court of the United States. This court held that the property owners had a right to introduce evidence in support of their objections and that the city council had denied such right and that such denial was a denial of due process of law. In passing upon this question this court said:

> "But where the legislature of a state instead of passing the tax itself commits to some subordinate body the duty of determining whether, in what amount and upon whom it shall be levied, and of making its assessment and apportionment due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed the taxpayer shall have an opportunity to be heard, of which he must have notice either personal, by publication, or by a law fixing the time and place of the hearing. (Citing numerous cases.) * * * If it is enough that, under such circumstances an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar,

but we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in judicial proceedings may be dispensed with in proceedings of this nature. But even here, a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof however informal.

Pittsburg, etc., Rd. Co. v. *Backus*, 154 U. S. 426.

Fallbrook Irrigation District v. *Bradley*, 164 U. S. 112-171.

It is apparent that such a hearing was denied to the plaintiff in error."

The case was reversed for that reason.

We, therefore, submit that the plaintiffs in error in this case were denied the right to be heard in the original proceedings and to introduce evidence upon the question of damages and benefits, and, especially the apportionment of the benefits over the entire district, and, also, what benefits were derived by the remaining portion of the property, from which the forty feet was to be taken to widen Sixth Street.

The Union Depot Bridge & Terminal Railroad Company submit the further proposition, in addition to the foregoing, that a jury had already assessed all benefits, to-wit, under Ordinance 3209, and so certified in their verdict, and which had been paid, and that a reassessment under the Ordinance 7539 was a re-examination of a fact decided by a jury which could not be reexamined under the Constitution of the State of Mis-

souri or under the second clause of the Seventh Amendment to the Constitution of the United States without denying said Union Depot Bridge & Terminal railroad Company of its property without due process of law. *C. B. & Q. Rd. Co.* v. *Chicago*, 166 U. S. l. c. 242-3. And, second, that the said Ordinance 7539 and the order of publication thereunder were so vague, indefinite and uncertain that they did not advise the said Union Depot Bridge & Terminal Railroad Company of any further assessment to be made against this property. *Bellingham Bay & B. C. R. Co.* v. *Whitcomb*, 172 U. S. 314. It had already paid its assessment under Ordinance 3209 and had accepted said verdict. And under the instruction of the court, the jury were told that they could not assess any benefits against property which had already been assessed and upon which the benefits had been paid. Yet, the jury were permitted in this supplemental proceeding, without any notice other than the supplemental ordinance and notice thereunder to the said Union Depot Bridge & Terminal Railroad Company, that the city deemed any of its property had been omitted or that a proper assessment had not been made against this property, to make another assessment of benefits against its property; and that the said Ordinance 7539, and the order of publication thereunder, were not sufficient to constitute due process of law against the said Union Depot Bridge & Terminal Railroad Company.

Plaintiffs in error contend that to give the construction to Section 23 of Article 6 of the charter of Kansas

City, as now contended for, by the Supreme Court of Missouri, violates the provisions of the Constitution requiring due process of law. Said section provides for the correction of errors, or defects in the proceedings, or in the verdict, or judgment, which does not render the whole proceeding void. The Supreme Court of Missouri, in the case of *State ex rel.* v. *Seehorn*, 246 Mo. 577, construed Section 23, and held that supplemental proceedings could be maintained while permitting the original proceedings, *so far as regular*, to remain in force and effect The court says:

> "The language thus used as to the procedure in supplemental proceedings, when considered in the light of the large number of tracts of real estate and of owners thereof to be affected, and the accordingly increased liability to mistake, leaves little doubt that the intention of the framers of the charter was to provide a remedy by which such mistakes could be corrected, *while permitting the original proceedings, so far as regular, to remain in force and effect*, and that in supplemental proceedings brought for that purpose the property owners *should be entitled to all the rights accorded to those whose property was assessed or taken in the original proceedings*. Any other construction is unreasonable and would render such provisions of the charter invalid, upon the ground that it would deny to some owners of property rights conferred upon others of the same class."

We think we have already demonstrated that plaintiffs in error were denied rights in this supplemental proceeding, which was given under original proceeding and that in denying the plaintiffs in error the right to introduce

evidence as to the amount of benefits received by their property and to introduce evidence as to the apportionment of the benefits over the various properties in the entire district, the court did deny to them rights conferred under the original proceedings upon others in the same benefit district. Under the original proceedings there can be no question but that the property owners in the benefit district had the right at least to offer evidence as to the amount of benefits their property would receive, and, also, what proportion of benefits their property did receive in proportion to the benefits of the entire district. This right was given them under the original proceedings by the charter, heretofore quoted. This right was denied to pliantiffs in error in the supplemental proceedings and therefore it gave the property owners in the benefit district in the original proceedings the right to have their property assessed according to the ratio laid down in Section 3 of the charter, while in this supplemental proceeding such right was denied these plaintiffs in error and they were thereby discriminated against in violation of the Fourteenth Amendment of the Constitution of the United States.

If the supplemental proceeding was intended to be the same as the original proceedings, then the rule announced by the trial court and affirmed by the Supreme Court makes a distinction between the property owners in the benefit district in the first proceeding and the property owners in the benefit district in the supplemental proceeding. The same ratio for determining the amount of benefits in the original proceeding should be applied

to determine the amount of benefits in the supplemental proceeding. Yet this rule was denied by the instruction of the trial court which told the jury that after deducting the benefits that the city received they should apportion the balance against the private property in the benefit district "as you may deem is benefited, if any, *and in the proportion in which you may deem the same benefited, etc.*" This was not the rule announced in Section 3, aforesaid.

It is evident that the procedure under the original proceeding may be erroneous or defective, although the court had jurisdiction of the subject-matter and acquired jurisdiction to hear and determine the issues involved, and this Section 23 was intended to apply where the original assessments were simply erroneous, and defective but not where the entire proceeding had been adjudged void as between the parties and where a valid publication had been made in the original proceeding but subsequent steps had not been taken, as required by the charter, then supplemental proceedings were authorized to revive, correct, increase or diminish the original assessments, as may be necessary or equitable under the provision of this article for the original proceedings.

This section further provides, "such supplemental proceedings shall be instituted and conducted as to the particular piece or pieces of private property sought to be acquired or assessed in like manner and with like effect as in the original proceeding." This provision certainly contemplates that the supplemental ordinance shall describe what particular piece of private property is

sought to be acquired or sought to be assessed in such proceeding. It certainly contemplates that the owners of such property shall have some notice of the particular piece of property which is going to be affected by this supplemental proceeding. Ordinance 7539 would give no person notice of which one of the thirteen thousand particular pieces of property was going to be affected by assessments of benefits. The order of court in this supplemental proceeding gives no notice to the property owners what particular piece of property is going to be assessed for benefits, and, we, therefore, submit that the supplemental proceeding, under this Ordinance 7539, was so vague, indefinite and uncertain that it did not give notice sufficient to constitute due process of law.

We, therefore, submit that the motion to dismiss the writ of error should be denied and that the motion to affirm the judgment should likewise be denied.

Respectfully submitted,

I. N. WATSON,
H. M. LANGWORTHY,
EDWARD WHITE,
KENNETH McC. DEWEESE,
ELLIOTT M. JONES,
Attorneys for Plaintiffs in Error.

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In the

Supreme Court of the United States

October Term, 1914.

ST. LOUIS AND KANSAS CITY LAND COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, UNION DEPOT BRIDGE & TERMINAL RAILROAD COMPANY, EDGEWATER TERMINAL RAILWAY COMPANY, MISSOURI PACIFIC RAILWAY COMPANY, FEDERAL INVESTMENT COMPANY, KANSAS CITY, ST. LOUIS & CHICAGO RAILROAD COMPANY, THE CHICAGO & ALTON RAILROAD COMPANY, STATE LINE IMPROVEMENT COMPANY, KANSAS CITY STOCK YARDS COMPANY, AND ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, *Plaintiffs in Error,*

VS.

KANSAS CITY, *Defendant in Error.*

No. 656.

BRIEF OF KANSAS CITY ON ITS MOTION TO DISMISS WRIT OF ERROR, OR AFFIRM JUDGMENT OF MISSOURI SUPREME COURT.

This case is here on a writ of error to review the final judgment of the Supreme Court of Missouri rendered against plaintiffs in error. Motions to dis-

miss the writ, or affirm the judgment, have been filed herein by Kansas City, defendant in error. A sufficient statement of the facts is attached to the motions to fully advise this Court upon the points raised by the motions, and we deem it unnecessary to again restate them in full in this brief; but, in a nut-shell, the facts are:

The City, in the exercise of its power of eminent domain, condemned land for the purpose of widening a public street; none of the lands of plaintiffs in error was so taken, and they had no notice of such proceedings; their lands, however, were in the benefit district, and afterwards, and upon legal notice to them, *supplemental* proceedings were conducted by the City, in the exercise of its power of taxation, in the premises, to assess their lands, and other lands in the benefit district, which had been wrongfully or erroneously assessed or omitted to be assessed in the original proceedings, and which assessments so made in the original proceedings could not be enforced, to pay, in part, for the lands so taken in the original proceedings for such public use. At the hearing of the last proceeding so conducted to assess their lands, plaintiffs in error (except the Bridge Company) appeared and contested. They contended in the state courts, among other things, that they were entitled to be heard upon the *amount* of the award allowed for the land taken, and in denying them such hearing they were deprived of their property without due process of law. Defendant in error contends that plaintiffs in error were not entitled to be heard upon the amount of the award allowed for the land of others so taken. And inas-

much as none of their lands was taken, and they were duly notified of the *supplemental* proceedings in which their lands were only assessed, that, under such circumstances, no Federal question is involved or presented by the record here, and therefore this Court has no jurisdiction to try this cause.

POINTS AND AUTHORITIES.

I.

There is no Federal question involved in this cause, and none is presented by the Record.

(a) The assessment of benefits to pay for land taken in the widening of a public street is the exercise of the taxing power of a municipality, as distinguished from the exercise of its power of eminent domain, and, therefore, is not taking private property without due process of law, if notice of the time and place of the proposed assessment is given, as was done in this case, and such a record presents no Federal question.

Goodrich v. *Detroit*, 184 U. S. 432, l. c. 437 and following.
Voigt v. *Detroit*, 184 U. S. 115, l. c. 120.
Spencer v. *Merchant*, 125 U. S. 345.
Londoner v. *Denver*, 210 U. S. 373, l. c. 378.
Frank J. Willoughby et al. v. *Chicago*, 35 S. C. R. 23.
State ex rel. Tuller v. *Seehorn, Judge*, 246 Mo. 568, l. c. 583.
Kansas City v. *Ward*, 134 Mo. 172, l. c. 179.
St. Louis v. *Ranken*, 96 Mo. 497, l. c. 507.

(b) The plaintiffs in error not being the owners of any of the property taken in the original proceeding, were not *necessary* parties thereto, and were not entitled to notice of such proceedings.

Goodrich v. *Detroit*, 184 U. S. 432.
Voigt v. *Detroit*, 184 U. S. 115, l. c. 120.

Weyerhaueser v. *Minnesota*, 176 U. S. 550.
Spencer v. *Merchant*, 125 U. S. 345.
1 Page & Jones on Taxation by Assessment, p. 213.
State ex rel. Tuller v. *Seehorn, Judge*, 246 Mo. 568, l. c. 583.
Kansas City v. *St. Louis & Kansas City Land Co.*, 260 Mo. 395 (copy of opinion attached to motion herein).
St. Louis v. *Ranken*, 96 Mo. 497, l. c. 507.
St. Louis v. *Brinckwirth*, 204 Mo. 280, l. c. 303.
St. Louis v. *Calhoun*, 222 Mo. 44, l. c. 53-54.
Kansas City v. *Ward*, 134 Mo. 172, l. c. 179-180.

(c) The provisions of the charter of Kansas City, Missouri, are regarded as having the same force as a legislative enactment; and ordinances passed in pursuance thereof are binding.

Morrow v. *Kansas City*, 186 Mo., l. c. 683.
McGhee v. *Walsh*, 249 Mo. 266, l. c. 281.
Ex parte Robert C. Smith, 231 Mo. 111, l. c. 122-123.

(d) The charter of Kansas City is a public act of which the courts take judicial notice.

Kansas City v. *Smart*, 128 Mo. 272, l. c. 298.
Sec. 16, Art. IX, Missouri Constitution.

(e) The construction placed on a statute of a state, or on an ordinance or a charter provision of a city in such state, by the highest judicial tribunal

of that state, will be followed by the United States Supreme Court.

King v. *Portland City*, 184 U. S. 61.
Baltimore Traction Co. v. *Baltimore Ry. Co.*, 151 U. S. 137.
Long Island Water Supply Co. v. *Brooklyn*, 166 U. S. 685.
Louisville Ry. Co. v. *Mississippi*, 133 U. S. 587-90.
Merchants & Manufacturers Bank v. *Pennsylvania*, 167 U. S. 461.
Frank J. Willoughby et al. v. *Chicago*, 35 S. C. R. 23.

(f) A decision by the state Supreme Court that the formalities of the state or municipal taxing laws have been observed presents no Federal question where the contention is that the manner of their observance was a denial of due process of law.

French v. *Taylor*, 199 U. S. 274.
Corry v. *Campbell*, 154 U. S. 629.

(g) In condemnation proceedings, under the Kansas City charter, where an appeal is taken by one of the parties interested, and the others do not, if there is a reversal of the judgment upon the appeal of one, there is a reversal as to all the parties interested in the proceedings or affected thereby.

Kansas City v. *Mulkey*, 176 Mo. 229, l. c. 247.

II.

On the Motion to Affirm.

If the Court should be of the opinion that the record presents a Federal question, and that the motion to dismiss should be overruled, then we submit that upon a consideration of the cases cited above it will be seen that the alleged Federal question contended for by plaintiffs in error has been heretofore so often decided by this Court against their contentions, that it must be manifest to the court that the writ of error herein was sued out for delay only, and that the questions on which the decision of this cause depends are so frivolous as not to need further argument, and therefore the judgment should be affirmed under paragraph 5 of Rule 6 of this Court.

Chanute City v. *Trader*, 132 U. S. 210-212, 214.
Swope v. *Leffingwell*, 105 U. S. 3.
Hinckley v. *Morton*, 103 U. S. 764.

ARGUMENT.

I.

There is no Federal question involved or presented by the record in this case, and the writ of error should be dismissed.

Plaintiffs in error, in suing out the writ of error and causing this case to be lodged in this Court for final review, manifestly have confused the exercise by the City of its power of taxation with the exercise of its power of eminent domain. The exercise of the one power does not necessarily involve the exercise of the other. They are separate and distinct powers, governed by entirely different rules of procedure and controlled by different principles of law.

The City in the exercise of its power of eminent domain, in the original proceedings, condemned lands for the purpose of widening a public street within its confines. In the supplemental proceedings the City exercised its power of taxation to raise a part of the money to pay for the lands so taken in the first or original proceedings. None of the lands of the plaintiffs in error was taken in the original or supplemental proceedings; but in the supplemental proceedings (of which they had legal notice) their lands were assessed with certain benefits to pay, in part, for the lands already taken in the first proceeding. They complained because they were not given an opportunity to contest the *amount* of the

award allowed for the land so taken. We contend they were not entitled to make such contest, and that in denying them such opportunity no right, privilege or immunity of theirs under the Federal Constitution was violated, and that in denying them such opportunity no Federal question is involved and they were not denied due process of law in violation of the Fourteenth Amendment of the United States Constitution.

The Supreme Court of Missouri has held that the only necessary parties to the first or original condemnation proceedings were the city and the parties whose lands the city was seeking to take. Those parties were in court in the original proceeding and now abide the judgment therein rendered. While the Kansas City charter provides in the first instance for the exercise of the power of eminent domain and the power of taxation in one proceeding, that charter provision was adopted to procure a more convenient and speedy method of trial, and not because there is any requirement of the Federal Constitution, that both powers shall be exercised in one proceeding. The powers could as well have been exercised in separate proceedings and the charter could have so provided (*St. Louis* v. *Ranken*, 96 Mo. 497, 507; *St. Louis* v. *Brinckwirth*, 204 Mo. 280, 303), and does so provide in the section authorizing supplemental proceedings; and the decision of the Supreme Court of Missouri that the provisions of the Kansas City charter do not require that the persons whose property is being assessed to pay the cost of the property taken in the condemnation proceeding, are necessary parties in that proceeding (*Tuller* v. *Seehorn, Judge*, 246 Mo. 568, l. c. 583; *Kansas City*

v. *St. Louis, etc., Co.*, 260 Mo. 395), is a construction of a local statute; and as that charter provision and the construction of it by the Missouri Supreme Court together establish a form of procedure which is not in violation of any provision of the Federal Constitution, there is no Federal question presented in this case. (*Missouri* v. *Dockery*, 191 U. S. 165, 170, 171; *Willoughby* v. *Chicago*, 35 Sup. Ct. Rep. 23, 24.)

The point presented by the plaintiffs in error that they were entitled to contest the amount of the award in the condemnation proceeding (they not being interested in the land taken), has been decided by this Court so many times against them that the question is no longer an open one.

The case of *Goodrich* v. *Detroit*, 184 U. S. 432, was a condemnation proceeding quite similar to the case at bar, in which the lands were taken in one branch of the proceedings and the benefits to pay for such lands were assessed in another. Goodrich was not notified of the first proceeding, nor was he present to contest the amount of the award, but in the second proceeding, to assess the benefits, he was given an opportunity to contest the amount of the assessment against his land. He contended, however, that the owners of the property liable to be assessed for the benefits were just as much interested in the proceedings as to the necessity for making the improvements and the *amount* of the compensation to be paid therefor, as were the owners of the land to be taken for such improvement, and that the same reasons for notice apply in the one case as in the other. This Court, speaking through Mr. Justice

Brown upon this point, denied such contention, and in doing so, on page 437, said:

> "The law in this Court is too well settled to be now disturbed, that the interest of neighboring property owners, who may possibly thereafter be assessed for the benefit to their property accruing from opening a street, is too remote and indeterminate to require notice to them of the taking of lands for such improvement, in which they have no direct interest. The position of the plaintiffs in this particular would require a readjustment of the entire proceedings, and a determination of the property incidentally benefited, before any proceedings are taken for the condemnation of land directly taken or damaged by such improvement. It might be argued upon the same lines that, whenever the city contemplated a public improvement of any description, personal notice should be given to the taxpayers, since all such are interested in such improvements and are liable to have their taxes increased thereby. It might easily happen that a whole district or ward of a particular city would be incidentally benefited by a proposed improvement, as, for instance, a public school, yet to require personal notice to be given to all the taxpayers of such ward would be an intolerable burden. Hence it has been held by this Court that it is only those whose property is proposed to be *taken* for a public improvement that due process of law requires shall have prior notice.
>
> "Thus in *Spencer* v. *Merchant*, 125 U. S. 345, it was held that, if a state legislature direct the expense of laying out a street to be assessed upon the owners of lands benefited thereby, and also determine the whole amount of the tax and what lands are, in fact, benefited, and provides for notice to and hearing of each owner, at some

stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of property without due process of law. Said Mr. Justice Gray (p. 356): 'But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are to be benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited.' So, in *Parsons* v. *District of Columbia*, 170 U. S. 45, it was held that an enactment by Congress that taxes levied for laying water mains in the District of Columbia, should be at a certain rate per front foot against all lots or lands abutting upon the street in which the main should be laid, was conclusive alike of the necessity of the work and of its benefits to all abutting property. So, also, it was said in *Williams* v. *Eggleston*, 170 U. S. 304, 311: 'Nor can it be doubted that if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited.' Cooley on Taxation, 2d Ed., p. 149.

"This question, however, is decided in the case of *Voigt* v. *Detroit City, ante,* p. 115, recently disposed of, and will not be further considered here. Indeed, so far as this question is concerned, this case might be affirmed upon the authority of that."

The Voigt case above mentioned was also a condemnation proceeding like the Goodrich case. This Court, after stating the facts and the decision of the state Supreme Court thereon, upon this point, at page 122, said:

"The law, then, as we understand the decision of the Supreme Court of the state, provides for the formation of a district in the vicinity of the proposed improvement, the limits of the district to be determined by the benefits derived from that improvement, and further provides that the common council shall determine what proportion of the cost of the improvement ('compensation awarded by the jury') shall be assessed upon the owners of the real estate benefited. The language of the statute is: 'The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may be, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement.'

"It would be difficult to find any provision fairer than this in purpose and which so essentially satisfies every requirement of due process of law. And such purpose cannot be defeated if a hearing to the property owner can prevent defeat. He is given a thoroughly efficient opportunity to be heard to test the legality of the charge upon him. And it is only with the charge upon him that he is concerned, and of

that alone can he complain. In the legality of that charge is necessarily involved the legality of all which precedes it and of which it is the consequence. The Supreme Court of the state decided, as we have seen, 'that the amount of the taxes which may be assessed upon the district or upon any given parcel of land cannot exceed the benefits.' On the hearing given, therefore, the property owner can show a violation of the rule, if a violation there be, and the showing will take his land out of the district and relieve it from the tax.

"The contentions of plaintiff in error seem to be based on the assumption that a property owner must have notice of every step of the proceedings. Such assumption is untenable. *Weyerhaueser* v. *Minnesota*, 176 U. S. 550, and cases cited; *King* v. *City of Portland, ante*, 61. Judgment affirmed."

In the case of *Londoner* v. *Denver*, 210 U. S. 373, l. c. 378, where the same contentions were made as here, this Court, following the doctrine laid down in the Goodrich and Voigt cases, *supra*, concerning the question of whether the land owner in the taxing district was entitled to notice and a hearing upon the necessity for the improvement and the cost thereof in the first instance, held that he was not, and that such denial was not depriving him of his property without due process of law. This Court, upon that branch of the case, at page 378, said:

> "The state Supreme Court held that the determination of the city council was conclusive that a proper petition was filed, and that decision must be accepted by us as the law of the state. The only question for this court is whether the charter provision authorizing such

a finding, without notice to the land owners, denies to them due process of law. We think it does not. The proceedings, from the beginning up to and including the passage of the ordinance authorizing the work, did not include any assessment or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done without hearing to the landowners, provided a hearing upon the assessment itself is afforded. *Voigt* v. *Detroit*, 184 U. S. 115; *Goodrich* v. *Detroit*, 184 U. S. 432."

The Londoner case, however, turned on another point. It seems that when the second branch of the proceedings were reached and the time came for the assessments to be taxed against the property to pay for the improvement originally ordered and provided for, no notice of the time and place of a hearing was given, as required by the charter of Denver, in such cases made and provided. For that reason the judgment of the Supreme Court of Colorado was reversed.

A hearing was afforded the plaintiffs in error in the case at bar upon the assessments sought to be made upon their lands in the supplemental proceedings, which they took advantage of and contested in every way known to skilled and trained lawyers.

In the very recent case of *Willoughby* v. *Chicago*, 35 Sup. Ct. Rep. 23, 24, this Court holds to the rule contended for by defendant in error. That case upon the facts was, in many respects, like the case at bar. It seems that in 1893 certain lands in Chicago were condemned for a public street, and

afterwards lands in the benefit district were assessed with assessments to pay for these betterments, including the lot in question. A trial was had in regard to these matters, and upon an appeal to the Supreme Court of Illinois it held that the part of the lots under consideration could be assessed with benefit assessments. However, there was a failure to send the mandate down within the two years as provided by the statute, and the assessment upon those lots failed. In January, 1910 (seventeen years afterwards), the city passed an ordinance for a new or supplementary assessment, the object of which was to reach these lots, and a new petition was filed and a hearing had thereon, in which the supplementary assessments were upheld. The second proceeding was appealed to the Supreme Court of Illinois and affirmed. From the final decision of the Supreme Court of Illinois in the last case, the plaintiffs in error sued out a writ of error and the case was brought here, the plaintiffs in error claiming that their property was taken without due process of law, contrary to and in violation of the Fourteenth Amendment to the United States Constitution. A motion was made there, as here, to dismiss the writ, on the ground that no Federal question was involved. This Court sustained the motion, holding that it had no jurisdiction of the matter. This Court, speaking through Mr. Justice Holmes, on that point said:

> "There is a motion to dismiss, upon which we must dispose of the case. The objection which is urged is that there was no statutory authority for this proceeding, and that the assessment was imposed by mere judicial fiat that

could not have been anticipated, and that was without warrant of law. If there were anything in this objection, it was obvious from the beginning; and as it was not taken at the trial it was not open in the Supreme Court of the state and could not be considered here. * * * It is obvious, too, that the state could have authorized the proceeding followed here, which ordinarily is the only question to be considered by this court. *Missouri* v. *Dockery*, 191 U. S. 165, 48 L. Ed. 133, 63 L. R. A. 571, 24 Sup. Ct. Rep. 53.

"If the assessment could have been levied against the original owners of the land, purchasers took subject to the same liability. *Seattle* v. *Kelleher*, 195 U. S. 351, 49 L. Ed. 232, 25 Sup. Ct. Rep. 44. The question whether it could have been levied if the land had not been sold depended upon the construction of state statutes, as to which we follow the decision of the state court."

The Supreme Court of the State of Missouri has held a number of times that the land owner in the taxing or benefit district is not interested in the land appropriated nor in the improvement to the extent that he is entitled to notice and a hearing at the time the land is taken. The Supreme Court of Missouri upon this point, in *Kansas City* v. *Ward*, 134 Mo., l. c. 179, in a condemnation case arising under the Kansas City charter, upon this point said:

"If the proposition contained in this *dictum*, that special benefits can be assessed against real estate only when the owner has or retains some property interest in the land taken for a public improvement, be correct, then the appellant's contention can be maintained, and benefit

districts for the establishment or improvement of public streets must hereafter be confined to the abutting property thereof.

"But to maintain such a doctrine would be to place an unwarranted limitation, unsupported by reason or justice, upon the principle upon which assessments for special benefits are upheld. The right to make such assessments being an exercise of the *taxing power;* and the foundation of the right, the benefit which the property assessed is supposed to receive from the expenditure of money, and having no necessary connection with the right of eminent domain or the property acquired for public use by the exercise of that power, or otherwise, the right to tax the property benefited by a public improvement of any character cannot in the nature of things be dependent upon a property interest in the improvement, and we have failed to find a reported case in which it is so adjudged.

"The right to tax the owner's property is not because he has a property interest in the improvement, or in the land appropriated therefor, but because his property is benefited by the improvement, to pay for which it is taxed, and for that reason only does the right exist and the power to exercise it; and it applies to his property benefited by a public park just as well as to his property benefited by a public street; as well to his property benefited by a public street in which he has no property interest, as by one on which his property abuts—and so it has been uniformly applied.

"It follows that the provisions in this article of the charter, by which the special benefit to the property in proximity to the park, over and above the benefits to be derived therefrom by the city generally, is to be charged against the property thus benefited, is not obnoxious to the constitutional provision which forbids the

taking of private property for public use without just compensation, and this point must be ruled against the appellants."

And again, the Supreme Court of Missouri, in *The City of St. Louis* v. *Ranken*, 96 Mo., l. c. 500 and 507, in a condemnation proceeding, speaking upon this point, said.

> "It is also as well settled that the power of the government by which such contribution is enforced, is the exercising of the taxing power of the government and not of the power of eminent domain. Such special benefit is a tax assessed against the particular property benefited.". * * * And, "It is not necessary that he (the property owner in the benefit district) should be made a party defendant by petition and summons in the condemnation proceedings. It is sufficient if he is made a party defendant to the tax-assessing branch of the proceedings, by the appropriate and characteristic notice usually given to the taxpayer, provided for in the charter and ordinances, and an assessment made in strict conformity to their requirements, is a valid assessment."

In the late case of *State ex rel. Tuller* v. *Seehorn, Judge*, 246 Mo. 568, l. c. 583, this being one of the cases growing out of *this* proceeding in which a writ of prohibition by the Supreme Court of Missouri was granted, upon this point it was then said:

> "It is also urged that the charter contemplates 'that the property owners in the benefit district shall have their day in court on the question of the *amount* of the allowance to be made for the property taken and damaged.' It

is plausibly argued in support of the foregoing that as the property owners of the benefit district and the city must pay the damages awarded for property taken, they should have their day in court as to the amount of damages for which their property shall be charged.

"In the exercise of the right of eminent domain in the taking of private property, as in the case in hand, the necessary parties are the city as plaintiff, on the one side, and the property owner as the defendant, on the other. And while it would be entirely proper as a matter of grace to permit the owner of property in the proposed benefit district to aid the city in preventing an unduly high valuation of the property condemned, *yet such owner would have no standing in court as a necessary party.* (*St. Louis* v. *Ranken*, 96 Mo. 497; *St. Louis* v. *Brinckwirth*, 204 Mo. 280; *St. Louis* v. *Calhoun*, 222 Mo. 44; *Pleadwell et al.* v. *Glass Co.* 151 Mo. App. 51; *Kansas City* v. *Smart*, 128 Mo. 272; 1 Page & Jones on Taxation by Assessment, 213; *Goodrich* v. *Detroit*, 184 U. S. 432).

"In the case of *Kansas City* v. *Smart*, *supra*, a proceeding under charter provisions similar to those involved in this case, in answer to questions raised by owners of property in the benefit district as to a denial of the rights of owners of property to be taken, this court, l. c. 292 said: "No person is interested in the *compensation* to be awarded these incorporated companies, except the city and the companies.'"

The case of *Weyerhaueser* v. *Minnesota*, 176 U. S. 550, is an interesting tax assessment case in which the plaintiff in error contended that his property had been revalued and reassessed for prior years

under a special law of the State of Minnesota without any notice to him of such re-valuation and re-assessment, and that in so doing he was deprived of his property without due process of law and in violation of the 14th amendment to the Constitution of the United States. In the agreed statement of facts in that case the following facts, among others, were agreed to:

> "That no notice of any of said proceedings by any of said persons in making said re-assessment or re-valuation of said lands or in extending said taxes against said lands was ever given by publication or otherwise to these defendants."

Notwithstanding the fact as agreed to, this Court held, following the Supreme Court of Minnesota in construing the statute under consideration, that under the law he did have notice to appear and protest.

This court further held that the proceedings did not violate the 14th amendment to the Constitution of the United States and did not deprive the owner of his land so re-assessed without due process of law, and the judgment of the Supreme Court of Minnesota was affirmed.

Necessary Parties to Condemnation Proceedings.

(b) *The plaintiffs in error were not entitled to notice of the original proceedings because they were not necessary parties thereto.*

This doctrine is fully sustained in *Goodrich* v. *Detroit*, 184 U. S. 432; *Voigt* v. *Detroit*, 184 U. S.

115, l. c. 126; *Spencer* v. *Merchant*, 125 U. S. 345, heretofore discussed in this brief.

In the case of *State ex rel., Tuller* v. *Seehorn, Judge, supra*, this point was squarely presented to the Supreme Court of Missouri, and that court in passing upon this question, at page 583 said:

> "In the exercise of the right of eminent domain in the taking of private property, as in the case in hand, the necessary parties are the city as plaintiff, on the one side, and the property owner as the defendant, on the other. And while it would be entirely proper as a matter of grace to permit the owner of property in the proposed benefit district to aid the city in preventing an unduly high valuation of the property condemned, *yet such owner would have no standing in court as a necessary party.*"

The Supreme Court of Missouri in that case, further commenting upon this point, quoting from *Kansas City* v. *Smart, supra*, said:

> "'No person is interested in the *compensation* to be awarded these incorporated companies, except the city and the companies.'"

And, in *St. Louis* v. *Ranken*, 96 Mo. 497, where a similar question was up and the same contentions were made, as here, that the plaintiffs in error were entitled to notice of the condemnation feature of the proceedings, the court, at page 507, said:

> "It is not necessary that he should be made a party defendant by petition and summons in the condemnation proceedings. It is sufficient if he is made a party defendant to the tax-

assessing branch of the proceeding, by the appropriate and characteristic notice usually given to the taxpayer, provided for in the charter and ordinances, and an assessment made in strict conformity to their requirements is a valid assessment."

So, in the case at bar while the plaintiffs in error were not parties to the condemnation branch of the proceedings, and were not necessary parties thereto, yet they were made parties to the tax-assessing branch of the proceedings so far as it affected their lands in the supplemental proceedings, and to which they responded and contested the amount proposed to be assessed against their lands for the public improvement.

The case of *St. Louis* v. *Brinckwirth*, 204 Mo. 280, l. c. 303, was one where the same question was presented in a condemnation proceeding and the court in that case, upon this point, said:

"In the case at bar defendants claim that the proceeding is void for two reasons: First, they say that they were not parties to the condemnation suit, and for that reason the entire proceeding is void. This contention is not good. None of their property was to be taken or in fact was taken. Their property simply abutted on one of the alleys to be established. Had the alleys required the appropriation of any part of their land, then they should have been made parties to the condemnation branch of the proceeding. Otherwise, they did not have to have notice of this suit (*City of St. Louis* v. *Ranken*, 96 Mo. 497)."

And, again, in *St. Louis* v. *Calhoun*, 222 Mo. 44, l. c. 53, 54, the Supreme Court of Missouri, in a condemnation proceeding, speaking upon this point, reiterated the same doctrine, and said:

> "Another contention is that certain property-owners whose lands were not to be taken, but against whom benefits were to be assessed, were not brought into the circuit court by summons and for this reason the proceeding is void.
>
> "This question was fully determined some years ago in the case of the *City of St. Louis* v. *Ranken*, 96 Mo., l. c. 507. In that case a party against whom benefits were assessed urged that he should have been made a party to the condemnation suit by summons from the Circuit Court, and that a mere notice from the city counselor for him to appear at the time and place fixed for the assessment of benefits was insufficient. In that case we then said: 'It is not necessary that he should be made a party defendant by petition and summons in the condemnation proceedings. It is sufficient if he is made a party defendant to the tax-assessing branch of the proceedings, by the appropriate and characteristic notice usually given to the taxpayer, provided for in the charter and ordinances, and an assessment made in strict conformity to their requirements is a valid assessment.'"

The court then quotes from the case of *St. Louis* v. *Brinckwirth*, *supra*, in which it said:

> "We disposed of the same question in this language:
>
> "'In the case at bar defendants claim that the proceeding is void for two reasons: First,

they say that they were not parties to the condemnation suit, and for that reason the entire proceeding is void. This contention is not good. None of their property was to be taken or was in fact taken. Their property simply abutted on one of the alleys to be established. Had the alleys required the appropriation of any part of their land, then they should have been made parties to the condemnation branch of the proceeding. Otherwise they did not have to have notice of this suit. (*City of St. Louis* v. *Ranken*, 96 Mo. 497.)'"

In 1 Page & Jones on Taxation by Assessment, at page 213, Sec. 125, the doctrine enunciated in the foregoing cases on this point is summed up as follows:

"Notice of every step in assessment proceedings is by no means necessary. On the one hand it is not necessary that notice be given of preliminary matters, which lead up to the determination of the amount for which each tract of property is to be assessed, but do not directly involve such determination. 'If the law provides for the required notice to the land-owner whose land it is proposed to charge with any part of the costs of the public improvement, an assessment against his property made under it will not be defeated if he has been given at some stage of the proceedings a fair opportunity to be heard to test the legality, justice and correctness of the assessment. It is only with the charge upon him that he is concerned, and of that alone he can complain. In the legality of that charge is necessarily involved all that precedes it, and of which it is the consequence. When the land-owner has been given a hearing at which he might insist that his property was

> not benefited to the amount assessed or that it was not benefited at all, and thus obtains every advantage which he might obtain were he informed of every step in the proceedings, there is no want of due process of law within the meaning of the Fourteenth Amendment. * * * So notice need not be given of the condemnation of realty to those whose lands are not to be taken, but are to be assessed for the cost of the improvement."

These cases and authorities are in line and harmony with the United States Supreme Court decisions on the same subject heretofore cited, the doctrine being that parties whose lands are not taken in a condemnation proceeding but who only possess lands in the taxing district, are not necessary parties to the condemnation branch of the proceeding, and are not entitled to notice and to a hearing upon that feature of the case; but when it comes to the taxing branch of the proceedings where their property will be assessed or taxed for the payment of land condemned and taken in the other branch of the case or proceedings, then they are entitled to notice and to a hearing. And if, as in this case, in the supplemental proceedings, notice was given and an opportunity afforded the plaintiffs in error to contest the amount of the tax which was about to be placed upon their lands for this public improvement, then due process of law has been observed as required by the United States Constitution and the State Constitution of Missouri, and no Federal question is involved here, and consequently this Court has no jurisdiction of this cause.

Kansas City's Legislative Charter Powers.

(c) The Supreme Court of Missouri in *Morrow* v. *Kansas City*, 186 Mo., l. c. 683, speaking in reference to the Kansas City charter and its power to legislate upon municipal affairs, said:

> " 'The powers of legislation conferred upon these municipal corporations to regulate and manage their local municipal affairs in conformity to ordinances adopted by themselves, were held no infringement upon the maxim that legislative power could not be delegated.' "

And in *McGhee* v. *Walsh*, 249 Mo., l. c. 281, after quoting the above the court said:

> "These considerations lead us to the conclusion that the provisions of Section 7 of Article 8 of the Charter of Kansas City of 1908, are to be regarded as having the same force as if they had been enacted into a statute by the General Assembly of the State."

In *Ex Parte Robert C. Smith*, 231 Mo., l. c. 122, 123, in construing the charter powers of Kansas City and St. Louis to pass certain ordinances then under discussion, the court said:

> "In this connection it need only be stated that it has been decided in various cases in this court, that a charter power of a freehold city, like Kansas City and St. Louis, under our Constitution, has all the sanction of a legislative enactment by the Legislature. We are of the opinion that the ordinance was clearly within the powers of the city conferred upon it by its

charter and that it is perfectly reasonable regulation."

(d) That the charter of Kansas City is a public act of which the courts take judicial notice is decided in *Kansas City* v. *Smart*, 128 Mo. 272, l. c. 298, in a condemnation proceeding in which the court said:

> "It will suffice to say that the charter of Kansas City is a public act, of which we are required to take notice."
>
> Sec. 16, Art. IX, Missouri Constitution.

Construction of Kansas City Charter and Ordinances by State Court to be Followed.

(e) *The provisions of the Kansas City charter and supplemental Ordinance No. 7539, passed in pursuance thereof, having been construed and upheld by the Supreme Court of Missouri, against the contentions of the plaintiffs in error, will be followed by this Court.*

The provisions of the Kansas City charter and the ordinances under consideration, passed in pursuance thereof, relating to condemnation proceedings and the assessment of benefits to pay for lands taken, having been, as we have seen, construed and upheld against the contentions of the plaintiffs in error by the Supreme Court of Missouri in the Ward case, the Smart case, the Ranken case, the Brinckwirth case, the Calhoun case, the Tuller-Seehorn case, *supra*, and in this case (opinion as a part of the statement of facts attached to motions herein), it

is the rule of this Court, as we understand it, to follow such construction and interpretation.

King v. *Portland City*, 184 U. S. 61.
Baltimore Traction Co. v. *Baltimore Ry. Co.*, 151 U. S. 137.
Long Island Water Supply Company v. *Brooklyn*, 166 U. S. 685.
Louisville Railway Company v. *Mississippi*, 133 U. S. 587, l. c. 590.
Merchants & Manufacturers Bank v. *Pennsylvania*, 167 U. S. 461.
Frank J. Willoughby et al. v. *Chicago*, 35 Sup. Ct. Rep. 23.

The case of *King* v. *Portland City* was one where this Court construed a charter provision and an ordinance passed in pursuance thereof relative to making assessments for the payment of street improvements in a case very similar to the case at bar, and in that case this Court, at page 70, said:

> "We are of the opinion, therefore, that under the facts of this case and the interpretation given of the charter of Portland by the Supreme Court of the state, plaintiffs in error have not been deprived of their property without due process of law, and the judgment of the Supreme Court is affirmed."

The case of *Baltimore Traction Co.* v. *Baltimore Belt Ry. Co.*, 151 U. S. 137, was one for the condemnation of lands for the use of a railroad. The contention was that the Act authorizing such condemnation proceedings, did not provide for notice to the land owner whose land was taken in violation of the Fourteenth Amendment to the Constitution of

the United States. This Court, speaking through its Chief Justice, upon this point, at page 138, said:

> "It was objected below that that section violated the Fourteenth Amendment of the Constitution of the United States, in that the owner of land condemned thereunder might be deprived of his property without due process of law because the Act did not provide for any notice to him of the proceedings; but it had been previously decided by the Court of Appeals of Maryland that the Act, properly construed, required notice. We are bound to accept this conclusion of the state court as to the proper construction of the statute of the state. *Green* v. *Neal*, 6 Pet. 291; *Davie* v. *Briggs*, 97 U. S. 628; *Louisville, etc., Railway* v. *Mississippi*, 133 U. S. 587, 590. * * * No suggestion is made that the validity of the statute was drawn in question as repugnant to the Constitution of the United States in any other particular, and as the want of requirement of notice did not exist, the alleged ground of our jurisdiction fails. Writ of error dismissed."

So, in the Tuller-Seehorn case, *supra*, and in the opinion in this case (the two cases growing out of the same proceeding) the provision of the Kansas City charter and the supplemental ordinance numbered 7539 were construed by the Supreme Court of Missouri against the contentions of the plaintiffs in error here. And it was held, as we have seen in those cases, that both the ordinance and the charter provision (Sec. 23, Art. 6) were valid and the proceedings had thereunder were not irregular; and that in the proceedings conducted under those ordinances and the charter provisions authorizing the same, due

notice was provided for and observed by which the plaintiffs in error were given an opportunity to be heard upon the amount of the assessment proposed to be levied against their land and that in and by such proceedings the plaintiffs in error were not deprived of their property without due process of law. The construction of the Supreme Court of the State of Missouri in these cases, it seems to us, comes squarely within the rule laid down in the Baltimore case cited above.

In the case of *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, this Court held:

> "In cases brought here from state courts their decisions are final in matters of procedure, and on alleged conflicts between the statutes of the state and its Constitution."

And it was further held:

> "In condemnation proceedings for that purpose the assessment of damages may be made by commissioners where the statute so provides, and there is no denial of due process of law in making their findings final as to the facts, leaving open to the courts the inquiry whether there was any erroneous basis adopted by the commissioners in their appraisal, or other errors in their proceedings."

In the case at bar, the provisions of the Kansas City charter (Sec. 23, Art. 6) are that in case errors and mistakes are made in the original proceedings, then supplemental proceedings may be carried on to correct such errors and mistakes in the former verdict and proceedings; that provision of

the Kansas City charter has been upheld by the Supreme Court of Missouri, and we contend that this case upon that feature comes squarely within the rule announced in the Long Island Water Supply Co. case, above mentioned.

The case of *Louisville Railway Co.* v. *Mississippi*, 133 U. S. 587, l. c. 590, was one where the statute of the state of Mississippi requiring separate accommodations for white and colored passengers had been construed by the Supreme Court of the state to apply solely to the commerce within the state. The point was made by the plaintiffs in error there that in making such provision it violated the interstate commerce clause of the Constitution of the United States; but when the case reached this Court, in passing upon the point raised, it adopted the construction of the State Supreme Court of Mississippi, and in doing so, held:

> "The construction of a state statute by the highest court of the state, is accepted as conclusive in this court."

Likewise, in *Frank J. Willoughby* v. *Chicago*, 35 U. S. Rep. 23, this Court followed the decision of the State Supreme Court of Illinois interpreting the regularity and legality of a certain condemnation proceeding hereinbefore fully discussed.

Observance of Formalities.

(f) *Where the State Supreme Court has held that the formalities of the municipal taxing laws have been observed, there is no Federal question in-*

volved where the contention is that the manner of their observance was a denial of due process of law.

In *French* v. *Taylor*, 199 U. S. 274, it was held that where the plaintiff in error contends that he was denied due process of law because the state officers, acting under the state revenue laws, did not fully comply with the statute, only questions of local law and fact are involved and the determination of the state court thereon, is not reviewable on a writ of error by this Court. In the course of the opinion, Mr. Chief Justice Fuller, speaking for the Court of this point, at page 277, said:

> "Indeed, counsel for plaintiff in error says in his brief that he does not contend 'that the Act itself is not sufficient to give due process,' but he insists 'that the manner of observance of that act is want of due process;' in other words, that the statutes had not been complied with. But the State Supreme Court held that the Acts provided for taxation *in rem;* that notice was given as required; that giving the name of the owner was not essential to the validity of the assessment, and that the county officers and defendants in error had fully complied with the laws. So that subdivision 11, in attacking the proceedings, only objects to the determination of questions of local law or of fact, not in themselves reviewable here. *Castillo* v. *McConnico*, 168 U. S. 674, 683; *Leigh* v. *Green*, 193 U. S. 79.
>
> "In *Castillo* v. *McConnico*, in which it was held that it was not the province of the court to interfere with the policy of the revenue laws of the state, nor with the interpretation given to them by their courts, and that an assessment could not be regarded as not constituting due process of law within the Fourteenth Amend-

ment because of error as to the name of the owner, if the state law might have dispensed with any requirement of mention of the name, Mr. Justice White said:

" 'The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the Fourteenth Amendment, and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative or coterminous. The first, due process of law, must be found in the state statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the lawmaking power of the state, and as it is solely the result of such authority may vary or change as the legislative will of the state sees fit to ordain. It follows that, to determine the existence of the one, due process of law, is the final province of this court, whilst the ascertainment of the other, that is, what is merely essential under the state statute, is a state question within the final jurisdiction of courts of last resort of the several states. When, then, a state court decides that a particular formality was or was not essential under the state statute, such decision presents no Federal question, providing always that the statute as thus construed does not violate the Constitution of the United States by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the state interpretation of its own law is controlling and decisive.' "

And so in *Corry* v. *Campbell*, 154 U. S. 629, in a case similar to the case at bar, this Court, speaking through Mr. Chief Justice Waite, said:

> "We have no power to correct the errors of state courts in respect to the details of assessments made by municipal corporations upon private property to defray the expenses of street improvements. Upon all such questions the action of the state court is final. There can be no doubt but that our jurisdiction is at an end if we find that sufficient provision has been made by law for contesting such a charge, when imposed, by an appropriate adversary proceeding in the ordinary courts of justice."

The judgment of the Supreme Court of Ohio in that case was affirmed upon the authority of *Davidson* v. *New Orleans*, 96 U. S. 97.

Effect of a Reversal.

(g) *The reversal upon the application of one appellant reverses the case as to all of the defendants in the trial court, under the law of Missouri.*

In this proceeding to condemn land for the widening of the street, a large benefit district was created and established for the purpose of assessing the land to pay for the improvement. About 13,000 different tracts of land were so assessed. Of the 13,000 about 8,000 paid when the original proceedings were concluded and before the supplemental proceedings were started. There is left about 5,000 tracts of land owned by nearly as many different persons whose lands were assessed in the supplemental proceeding. Of those affected by these pro-

ceedings, only the plaintiffs in error have prosecuted appeals and this writ of error. Evidently all of the other tax-paying property owners in the benefit district were satisfied with the verdict and the assessment made against their lands. It remains for these plaintiffs in error to prolong and continue this litigation evidently contrary to the wishes of the other defendants like situated. If this case is to be heard upon its merits and should a reversal of the Supreme Court of Missouri result, then the case would be reversed as to all of the defendants in the lower court in the supplemental proceeding because under the law of Missouri, as decided in *Kansas City* v. *Mulkey*, 176 Mo. 229, l. c. 247, the reversal of a case of this character upon the application of one appellant reverses as to all of the parties interested in the proceeding, whether they have appealed or not. The Supreme Court of Missouri in that case, upon this point, said:

> "An appeal was taken by two of the parties interested in the result of that proceeding, and these appellants, as defendants therein, though not appealing, are equally bound by the result of that appeal as though they had joined therein. This court has held in cases of this character that, upon a reversal, the whole verdict and judgment is set aside, even though one person only prosecuted his or her appeal and the assessment of damages was made to each individual defendant as his or her interest in the property to be taken was made to appear, and that a new trial must be had as to all defendants upon the issues of the value of their property sought to be condemned."

II.

On the Motion to Affirm.

From an examination of the record and a review of the authorities hereinbefore discussed, it must be evident to the Court that the writ of error herein was sued out for delay only and that the questions on which a decision of this cause depends having been by this Court so many times decided adversely to the contentions of the plaintiff in error, are so frivolous as not to need further argument, and therefore under paragraph 5 of Rule 6 of this Court the judgment of the Supreme Court of Missouri should be affirmed even though the Court may have jurisdiction to re-examine the cause.

Although the Court may hold that it has jurisdiction, since a motion to affirm has been coupled with the motion to dismiss, the judgment may be affirmed on the ground that the case on its merits is governed by previous decisions. Such has been the practice of this Court. The following, among other cases, sustain our point:

Chanute City v. *Trader*, 132 U. S. 210.
Swope v. *Leffingwell*, 105 U. S. 3.
Hinckley v. *Morton*, 103 U. S. 764.

In the Chanute City case the court, among other things upon this point, at page 213, said:

> " 'Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both

according to its letter and spirit. Parties should not be subject to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked.'

"The practice of not entertaining a motion to affirm unless there is some color of right to a dismissal has since been frequently sustained by this court. *Hinckley* v. *Morton*, 103 U. S. 764; *School District of Ackley* v. *Hall*, 106 U. S. 428; *Davies* v. *Corbin*, 113 U. S. 687; *Walston* v. *Nevin*, 128 U. S. 578; *New Orleans* v. *Construction Co.*, 129 U. S. 45; *The Alaska*, 130 U. S. 201.

"In *Micas* v. *Williams*, 104 U. S. 556, there was a motion to affirm united with a motion to dismiss a writ of error. The affidavits in opposition to the latter motion showed jurisdiction, as to the amount involved, though on the record as it stood when the motion was made there was color of right to a dismissal. But the court affirmed the judgment on the ground that the writ was taken for delay only.

"In the *S. C. Tryon*, 105 U. S. 267, there was a motion to affirm a decree united with a motion to dismiss the appeal in an admiralty suit. The ground for making the motion to dismiss was that there was no bill of exceptions, but only a finding of facts and conclusions of law. The court overruled that ground, but it is difficult, from the report of the case, to see what color of right there was to a dismissal. Yet it affirmed the decree on a consideration of the findings of fact.

"In *Swope* v. *Leffingwell*, 105 U. S. 3, there was a motion to affirm united with a motion to dismiss a writ of error to a state court. The motion to dismiss was made on the ground that

there was no Federal question involved. The court held that it had jurisdiction, but affirmed the judgment on the ground that the case on the merits was governed by previous decisions.

"In the present case there does not appear to be any ground for contending that this court has no jurisdiction; yet we are entirely satisfied that the reasons assigned for taking the writ of error are frivolous, and that it was taken for delay only. * * * This court, in the exercise of its inherent power and duty to administer justice, ought, independently of subdivision 5 of Rule 6, to reach the mischief by affirming the action below. This is a proper case for doing so. Judgment affirmed."

The Swope and Hinckley cases, *supra*, are to the same effect.

All other points raised by plaintiffs in error in their alleged assignments of error, present purely local questions of fact or constructions of local law, and in no wise present a Federal question; they are fully covered and disposed of by the adjudicated cases herein before cited and need no further comment.

The Bridge Company's Claim.

The Bridge Company's claim (paragraph 3, assignments of error, page 50, motions and statement of facts herein) that its property was assessed twice, is not sustained by the record. There is nothing in the record brought to this Court which will enlighten us on this point of fact, except what is contained in the opinion of the Supreme Court of Missouri in this case (page 42 of statement of facts

attached to the motions herein), and therein the Supreme Court of Missouri found against it on the fact contended for. In any event, no Federal question is thereby presented. Even the assessing of property twice for a public improvement is not taking property without due process of law, in violation of the Federal Constitution, and it was so decided by this Court in *Davidson* v. *New Orleans*, 96 U. S. 97, l. c. 106; that was a case to enforce special assessments for a public improvement, and this Court, speaking on this point through Mr. Justice Miller, page 106, said:

> "One of two errors assigned, and not mentioned in the earlier part of this opinion, deserve a word or two.
>
> "It is said that the plaintiff's property had previously been assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the state to tax or assess property twice for the same purpose, we know of no provision in the Federal Constitution which forbids this, or which forbids unequal taxation by the states. If the Act under which the former assessment was made is relied on as a contract against further assessments for the same purpose, we concur with the Supreme Court of Louisiana in being unable to discover such a contract."

Conclusion.

Upon a review of the facts as contained in the record, sufficient of which is set forth in the statement attached to the motions herein, it will be found that the plaintiffs in error were fully and legally notified of the time, purpose and place of the tax-

assessing branch of the condemnation proceedings in which it was sought to tax their property for the public improvement and were thereby given an opportunity to protest; that they all, except the Bridge Company, responded and contested; that the Bridge Company had the same opportunity to be present and contest a tax upon its property, but it neglected to avail itself of such opportunity until too late; that since the plaintiffs in error were all given such opportunity, the law is, as we have seen from the cases cited, and many others which might be cited, that they were not deprived of their property without due process of law, and therefore no Federal question is involved and presented by the record here. That being true, this Court has no jurisdiction of this cause and the writ should be dismissed, and if not, then since the same or similar questions have been so many times heretofore decided adversely by this Court to the contentions of plaintiffs in error, it is evident that the writ was sued out for delay only, and the judgment of the Supreme Court of Missouri should be affirmed.

All of which is respectfully submitted.

ANDREW F. EVANS,
City Counselor of Kansas City, Missouri,
ARTHUR F. SMITH,
JESSE C. PETHERBRIDGE,
Assistant City Counselors of Kansas City, Missouri,
Attorneys for Defendant in Error.

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No. 261.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

ST. LOUIS AND KANSAS CITY LAND COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

VS.

KANSAS CITY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT, ASSIGNMENTS OF ERROR, BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

I. N. WATSON,
EDWARD WHITE,
H. M. LANGWORTHY,
KENNETH MCC. DEWEESE,
Attorneys for Plaintiffs in Error.

ANDREW F. EVANS,
City Counselor of Kansas City, Mo.,
ARTHUR F. SMITH and
JESSE C. PETHERBRIDGE,
Assistant City Counselor,
Attorneys for Defendant in Error.

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VS.

KANSAS CITY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT.

In October, 1909, the Common Council of Kansas City, Missouri, passed an ordinance (No. 3209) entitled "An Ordinance to Open and Widen Sixth Street from the East Line of Bluff Street to the West Line of Broadway." This ordinance is set out in full in transcript of record, page 56. Proceedings were instituted under said ordinance in the Municipal Court of Kansas City, to condemn forty feet of land on the south side of Sixth from Bluff St. to Broadway, a distance of two blocks.

The Charter of Kansas City, Art. 6, Sec. 2, relating to condemnation proceedings to open or widen streets, provides that the city shall pass an ordinance describing the private property to be taken or damaged, and if the same is to be paid for wholly or partly in assessments, it shall describe the limits within which private

property shall be deemed benefited by the proposed improvements, and be assessed to pay compensation therefor. Thereupon, the city engineer shall make out and deliver to the clerk of the Municipal Court a statement by plat, map or otherwise containing a correct description of the several lots or parcels of private property to be taken or damaged, with the names of the owners or parties interested therein, and the court shall thereupon, *by order*, appoint a day and place for empaneling a jury to ascertain the compensation for the property to be taken or damaged, and to make assessments to pay for same, which order shall recite the number and title of said ordinance, the date when it took effect, and contain a description of the property proposed to be taken or damaged, as contained in said ordinance, and also a description of the property *contained in the benefit district*, as described in said ordinance, and naming the day and place fixed by said court for empaneling a jury to ascertain the compensation for property to be taken or damaged, and to make assessments to pay for the same, *which order* "shall be directed to all persons whom it may concern without naming them" and shall be published for four consecutive weeks in some newspaper doing the city printing. The last insertion to be not more than seven days prior to the day set for hearing such cause. No other notice is required to be given property owners whose property is to be assessed benefits.

This section also provides: "Notice so given by publication shall be sufficient to authorize the court to hear and determine the cause, and to make any finding or order, or render any judgment therein, as fully as though all the parties interested at any time of the taking effect of such ordinance or at any time thereafter had been sued by their proper names and had been personally served."

This section also provides that the Municipal Court shall cause to be impaneled a jury composed of six men who shall be disinterested free-holders of the city, etc.

By Section 3 it is provided that the jury shall ascertain the just compensation to be paid as follows:

(1) For each piece of private property taken where the public use thereof shall be such that the city must have the exclusive possession and control thereof the actual value of the property taken.

(2) For each piece of private property taken where the public use thereof may be such that the city need only have such possession and control as will not wholly exclude the possession and beneficial use thereof by the owner or owners the actual damage from the public use specified in the ordinance.

(3) For all damages to each piece of private property not actually taken, so as to give the city the possession or control of the same, the actual amount of the damages such property may sustain from the use of the private property taken for the public use for which it may be taken, including all that the city may from time to time do or cause to be done, in, with or upon the private property so taken.

Said section further provides that to pay such compensation "The jury shall assess against the city the amount of benefit to the city and public generally exclusive of benefit to any property of the city, and the balance of such compensation they shall assess against the several lots and parcels of private property within the benefit district, exclusive of the improvements thereon, deemed benefited by the proposed improvement as determined according to the preceding section; *each lot or parcel of ground to be assessed with an amount bearing the same ratio to such balance as the benefit to each lot or parcel bears to the whole benefit to all the private property assessed. Parties interested may submit evidence to the jury and the latter shall examine personally the property to be taken, damaged and assessed.*" * * *

The section further provides that the jury shall return a verdict which shall contain a correct description of each lot or parcel of private property taken and the value thereof and of each lot or parcel damaged, and the amount of injury thereto, and also the amount assessed against the city, together with a correct description of each lot or parcel of private property assessed, and the amount assessed against same.

Section 4 provides that after a verdict is rendered, the clerk of the Municipal Court shall report the same to the Common Council. If the verdict and proceedings be confirmed by ordinance within 60 days from the making of such report, the proceedings and verdict shall stand. If not the verdict and proceedings shall be void.

This section also provides that the several amounts assessed by the jury against private property shall be a lien on the several lots and parcels of private property charged from the date of the enactment of the ordinance providing for the improvement until paid, and if not paid within 60 days after confirmation of the verdict the amount shall bear interest at the rate of 7 per cent per annum from the date of confirmation thereof, and shall be collected as any other special tax bill, or by special execution.

This section further provides that the special tax bill against any lot or parcel of property may be issued by the clerk of the Municipal Court, which tax bill shall contain the description of the lot, amount assessed, etc., and shall state "that the assessment has been made to pay compensation for private property taken or damaged, etc."

The tax bill shall be filed in the office of the clerk of the Circuit Court of Jackson County in Kansas City, Missouri, and by such clerk recorded, and indexed as a judgment in favor of the city against the property described in the tax bill.

This section further provides that an execution thereon may be issued and directed to the sheriff of Jackson County commanding him, in case the assessment, interest and cost be not paid to him, to sell the property therein described, etc. This section further provides for a sale and a sheriff's deed and that "Tax bills filed and recorded as aforesaid, shall be subject to the order of the court and may be set aside, or the amount of assessment reduced on motion of any party interested in the property assessed, etc., by giving notice of the filing of such motion."

This section further provides "If by reason of any defect or omission in the proceedings the city cannot acquire title or right to any particular lot or parcel of property or any interest in any lot or parcel of property sought to be taken, the court shall on the fact being made to appear, reduce the assessment by deducting therefrom so much thereof as was assessed on account of the property or interest in the property sought to be taken, but not acquired, to be determined as far as practicable from the verdict of the jury making the assessment, and awarding execution for the residue."

Section 5 provides for a common law jury of twelve, where any incorporated company has an interest in any parcel of land to be taken and damaged by the said proceedings.

Section 6 provides "In case the city or any person affected by the proceedings, *either as the owner thereof, or interested in any of the property taken or damaged, or as the owner of, or interested in any of the property assessed,* shall feel aggrieved by the verdict of the jury, such parties so aggrieved may within 20 days from the time the verdict of the jury is confirmed, appeal to the Circuit Court of Jackson County, Missouri, at Kansas City."

This section further provides for the filing of the transcript of the proceedings with the clerk of the Circuit Court of Jackson County at Kansas City "And thereupon the said Circuit Court shall become possessed of the cause, and said cause—unless dismissed, shall be *tried de novo in said Circuit Court* and have precedence over all other causes for trial"; and this section further provides that if necessary the Circuit Court shall have the power to make and bring in other parties to such proceedings, on service of notice upon them to be made in the manner required by Section 2 of this article.

This section further provides that "the verdict of the jury and the judgment thereof shall be a lien on the several lots or parcels of ground assessed," and that such judgment shall be enforced by special execution, etc.

Section 7 provides "Any party or parties may appeal from the judgment of the Circuit Court in such manner as appeals are taken in other civil causes, but the only bond required of the party appealing shall be one, conditioned that should the judgment of the Circuit Court be affirmed by the Appellate Court or should such appeal be dismissed, he will pay all costs of such appeal."

Upon the filing of a copy of Ordinance No. 3209 in the Municipal Court of Kansas City, Missouri, that court made an order, as provided for in Sec. 2 of Art. 6, aforesaid, which order is set out in the transcript of record, pages 110 and 111. The order of the court among other things provides: "And the court further orders that a copy of this order shall be published in the 'Daily Record' (the newspaper at this time doing the City printing), for four consecutive weeks, the last insertion to be not more than one week prior to the day set for said hearing."

The affidavit of the publisher is set out in Transcript of Record, page 115, and it shows this order was not published four consecutive weeks, as required by the charter and the order of the court.

The case was continued from time to time until the 7th day of March, 1910, when the jury reported that they had viewed the property to be taken, damaged and assessed, and the record further recites: "And having heard the evidence and being instructed by the court, rendered their report and verdict and are by the court discharged." That part of the verdict affecting the appellants herein is set out in transcript record on page 49. The total amount of damages assessed for property taken, under Ordinance No. 3209 was $166,299.57. The total amount of benefits assessed in said proceedings were the same amount. The assessments against the lots and parcels of land of each of the appellants are specifically mentioned in the transcript of record, lower part of page 49 and upper part of page 50.

The only notice given to plaintiffs in error of the pendency of proceedings, under Ordinance 3209, was the publication notice heretofore mentioned. After the time for appeal had expired, the plaintiffs in error were advised by the city of the assessments made under Ordinance 3209, and thereupon the Union Pacific Railroad Company and part of the other plaintiffs in error herein filed a bill in equity in the Circuit Court of Jackson County, Missouri, at Kansas City against M. A. Flynn, City of Kansas City, U. L. Weary, clerk of the Municipal Court of Kansas City and Oscar Hochland, clerk of the Circuit Court of Jackson County, Missouri, to enjoin the collection of said assessments, and in said bill it was alleged that Kansas City had not given a legal notice of said proceedings and had not published the order of court as required by the charter of Kansas City, and they prayed the court to make an order perpetually restraining and enjoining each of the said defendants from executing said judgment of the municipal court and from making out and certifying any tax bills against the property of the complainants, and that the circuit clerk be enjoined or restrained from recording any of the tax bills as a judgment in favor of Kansas City against the above described property of complainants, and from issuing any execution thereon out of said Circuit Court; and they further prayed the court to adjudge and decree that such proceedings to open and widen 6th Street and to assess benefits against the complainants' property, be declared in violation of the charter of Kansas City, and null and void, and that such publication be decreed to be not due process of law required by the 14th Amendment to the Constitution of the United States, and that said

proceedings be declared to be no lien on the property of the complainants. The said cause was heard on the 31st day of January, 1911, and thereupon the Circuit Court of Jackson County, Missouri, entered the following decree in said cause: "And the court further finds that none of said complainants were served with notice of process of any kind in said proceedings in the Municipal Court; that none of said plaintiffs had any knowledge thereof or opportunity to be heard thereunder; that none of said plaintiffs entered appearance therein in person or by agent or attorney, and none of them had any knowledge of the finding in said proceedings until long after the verdict therein had been rendered and confirmed and judgment thereon entered, and the time within which appeals might be taken therefrom had expired. * * * The court further finds that said *proceedings, verdict and confirmation thereof, and judgment is as to these plaintiffs and each of them, and as to their respective properties, inoperative and of no effect, and that the several assessments undertaken to be made and levied on the plaintiffs' said property are void, and that said Municipal Court in said proceedings had and acquired no jurisdiction therein of the plaintiffs, or any of them, or of their said properties.* It is therefore considered, ordered, adjudged and decreed by the court that said assessments insofar as they affect, or purport to affect, plaintiffs, or any of them, or any of their several properties, be, and the same are hereby null and void and for naught held; that the several assessments against the respective properties aforesaid of the plaintiffs, and each of them, be and the same are hereby set aside and annulled; and that the defendants, Kansas City, M. A. Flynn, City Clerk, U. L. Weary, Clerk of said Municipal Court, and the officers and agents of said city, be and they are each of them perpetually restrained and enjoined from making out, certifying or attesting any tax bills against the several properties of the plaintiffs, or any of them under and by virtue of said assessments, etc." (See Transcript of Record, pp. 124, 125).

No appeal was taken from this judgment and it is final and conclusive as to all parties thereto. Thereafter the City Council of Kansas City, Missouri, passed an Ordinance No. 7539, which is set out in full on pages 31 and 32 of transcript of record. This is known in the record as a supplemental ordinance, and the caption is as follows: "An ordinance providing for authorizing and di-

recting the institution carrying on and maintaining of supplemental proceedings to properly assess benefits against certain pieces and parcels of land included within the benefit district prescribed by Ordinance 3209, approved Oct. 19, 1909."

The preamble of this ordinance states: "Whereas proceedings were instituted under said Ordinance (3209) in the Municipal Court of Kansas City, to condemn the land in said ordinance described, and a verdict was rendered in said Municipal Court, and whereas, by reason of certain errors, defects and omissions, certain assessments were made against land in the benefit district prescribed by said ordinance, which cannot be enforced or collected, and certain pieces of private property in the benefit district were omitted and not assessed by said verdict." * * *

Now, therefore, be it ordained by the Common Council of Kansas City, (Sec. 1): That the Mayor and City Counselor are hereby authorized and directed to institute, carry on and maintain supplemental proceedings to properly assess against any piece or parcel of private property within the benefit district prescribed by Ordinance No. 3209, approved Oct. 19, 1909; against which an assessment was in the first proceeding wrongfully made or which was omitted to be made, the proper amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement, such amount to be determined by the verdict of a jury in such supplemental proceedings, as provided by Art. 6 of the Charter of Kansas City." Thereupon a copy of this ordinance was filed in the Municipal Court of Kansas City, Division No. 1, and thereupon the court made an order which is set out in Transcript of Record, page 63. This order sets out Section 1 of said ordinance above quoted, and then it sets out the provision of Ordinance 3209, describing the property to be taken. This order then provides "The property contained in the benefit district as described in Ordinance 3209 being as follows:" Then it sets out the outlines of the benefit district, in said ordinance but does not set out any particular piece or parcel of property that is sought to be assessed with benefits in the supplemental proceedings (See Transcript of Record, pages 63 and 64). The order is directed "To all persons whom it may concern, greeting" and then it closes as follows: "Now, therefore, you and each of you are hereby notified that the 17th day of March, 1911, at 2:00 o'clock P. M.

is the day, and the Lower House Council Chamber on the 4th floor of the City Hall building on the southeast corner of Fourth Street and Main Street in Kansas City, Jackson County, Missouri, is the place fixed for empaneling a jury to properly assess against any piece or parcel of private property within the benefit district above described, against which an assessment was in the original proceedings wrongfully made, or which assessment was omitted to be made, the proper amount such private property exclusive of the improvements thereon is benefited by the proposed improvement."

It is nowhere stated in said Ordinance No. 7539 what particular piece or parcel of private property had been wrongfully assessed, or what lot or parcel of private property had been omitted from assessment in the original proceedings.

The record shows there were some 13,300 separate lots and parcels of private property in the benefit district to be assessed (See Transcript of Record, 99). The order of court was published in the Daily Record four consecutive weeks, as provided by Sec. 2 of Art. 6, aforesaid. These supplemental proceedings were begun and held under the terms and provisions of Section 23, Art. 6 of the Charter of Kansas City. This section provides:

"When by reason of any error, defect, or omission in any proceedings, or in the verdict or judgment therein that may be instituted under the provisions of this article, a portion of the private property sought to be taken, or some interest therein, cannot be acquired, or an assessment is made against private property which cannot be enforced or collected, or when, by reason of any such defect, private property in the benefit district is omitted, the city may, by ordinance, institute, carry on and maintain supplemental proceedings to acquire the right and title to such property or interest therein intended to be taken by the first proceeding, but which cannot on account of such defect, error or omission, be acquired thereunder, or to properly assess against any piece or parcel of private property against which an assessment was in the first proceeding erroneously made or omitted to be made, the proper amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement to be determined by the verdict of the jury in such supplemental proceedings; and the original assessments may be revived, corrected, increased or diminished as may be necessary or equitable under the provisions of this Article for the original proceedings.

Such supplemental proceedings shall be instituted and conducted as to the particular piece or pieces of private property sought to be acquired or assessed in like manner and with like effect as in the original proceedings, and shall be known and described as supplemental proceedings for the purposes specified in the original ordinance; and a supplemental verdict and assessment shall be made, confirmed and copies of the original verdict certified in every particular as in the original proceedings; and the assessments as established and corrected by such supplemental verdict shall be collected by the City Treasurer in the same manner and under like conditions and restrictions, powers and duties as in the case of original proceedings."

At the trial held under the supplemental proceedings in the Circuit Court, counsel for plaintiff in error objected to the validity of all proceedings under the supplemental ordinance for the reason that the ordinance was insufficient and did not specify what lots or parcels of private property had been wrongfully assessed or had been omitted from assessments in the original proceedings, and that this ordinance did not specifically point out or specify any errors or omissions which were sought to be corrected by said supplemental proceedings. Neither did said ordinance specify what property was to be taken or what particular lots or parcels of private property in the benefit district were to be assessed, or what lots or parcels of private property were omitted or failed to be assessed in the former proceedings, and that the ordinance did not specify what errors or omissions were made in the former proceedings (See Transcript of Record, pages 50, 52-55 & 58).

The further objection was made by the Union Pacific Railroad Company that it had theretofore brought a bill in equity in the Circuit Court of Jackson County to enjoin the collection of said taxes assessed under the original proceedings, and that at the hearing of said bill in equity, the Circuit Court had adjudged the proceedings, under Ordinance No. 3209, null and void for want of proper notice.

And the Union Pacific Railroad Company further objected to the introduction of any testimony in said supplemental proceedings for the reason that it had property within the benefit district, and that before any damages could be awarded for property taken, or benefits assessed against the property of the Union Pacific

Railroad Company, it was entitled to a legal notice of the original proceedings, and entitled to a hearing in court in such proceedings, of the amount of damages, if any, to be awarded for property so taken, and for which benefits were to be assessed against its property; and that the Union Pacific Railroad Company never had its day in court to be heard upon the question of the amount of damage which should be assessed, for the property taken and for which benefits were to be assessed against its property, and that to deny it such right to be heard and such right to question the award of damages and the assessment of benefits against its property to pay such award, the court was taking its property without due process of law and denied it equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States and the protection of the said amendment was invoked, "as a shield against any assessments for benefits until said Union Pacific Railroad Company had had an opportunity to be heard upon the amount of damages that should be awarded to property owners and the *amount of benefits to be assessed against it as provided by the Charter of Kansas City, Missouri, in the original proceedings*" (See Transcript of Record, pages 50-52, 55 and 58). The same objections were also made on behalf of each and all of the plaintiffs in error (Transcript of Record, 52, 53).

All through the trial of the case in the supplemental proceedings, the plaintiffs in error maintained and ever since have maintained that they had a right to the notice in the original proceedings prescribed by Section 2 aforesaid, and that they had a right to be heard before the jury in such proceedings upon the total amount of damages to be assessed, and the total amount of benefits to be apportioned to each lot or parcel of private property in the entire benefit district, as provided by Section 3 of the Charter of Kansas City aforesaid. That if they were not satisfied with such assessments, they had the right given them to appeal to the Circuit Court and there have their case tried *de novo;* and that by virtue of Sec. 3 of Art. 6 aforesaid, they were given the right to "submit evidence to the jury in the trial in the Municipal Court," and by Sec. 6 they were given the right to appeal to the Circuit Court if they felt aggrieved by the verdict of the jury in the Municipal Court, and that on such appeal in the Circuit Court "the said cause unless dismissed shall be tried *de novo* in the Circuit Court."

At the trial of the case under the supplemental Ordinance No. 7539, the city was permitted to introduce the verdict of the first jury, showing the total amount of damages assessed was $166,-299.57. Objection was made to the introduction of this testimony for the reason "that to receive it (verdict) in evidence as against these parties who are now first brought before the court, is to receive in judgment against them a finding in a case in which they were not parties at the time it was made, and, is to deny them their day in court upon the question of the amount of damages that are to be awarded, without giving them an opportunity to be heard upon that question. This objection was overruled and excepted to (Record, 95, 96).

Thereupon the following occurred:

"Q. Has any portion of that amount been paid? A. Yes, sir. Q. What amount has been paid? A. The total benefits collected amount to $89,317.59. Q. What is the balance still unpaid? A. The balance still unpaid is—— (Mr. Watson interrupting): I object to that. The matter of the balance unpaid is a matter for this jury to determine and not the other jury. The amount assessed has nothing to do with this case. Court: My understanding is that the Supreme Court says that this jury could only assess the benefits of the parties who had not recognized the former proceedings. Mr. Watson: I don't understand that this jury could not determine the amount of benefits on each particular piece of property. The amount which the other jury assessed on any particular property is not a matter for this jury. The question is: 'What particular property is benefited by this proceeding?'; and we are not bound to take the distribution of the portions, which have already been found, if any have been found. That is what they are asking to do now—take the amount which has already been fixed and spread it over our property. I object to it for the reason that this jury is to determine the amount assessed against this particular property which has been affected. I object to it for that reason. Court: Well, as an original proposition that objection would have been sustained; but in the light of the opinion of the Supreme Court, it will be overruled." To which ruling and action of the court the defendant, Union Pacific Railroad Company and other defendants severally by their counsel then and there excepted (Transcript of Record, pages 95-96).

After further discussion and objection, the court in passing on the same question again ruled as follows: Court: "In order to determine whether the damages exceeds the benefits, the jury must take in the entire district. *Now, this jury is concluded from changing the assessment on the property of parties who recognize the municipal proceedings.*" To the ruling of the court the plaintiffs in error at the time duly excepted (See Transcript of Record, page 97).

And again the city introduced testimony as follows:

"Q. Does this map of the benefit district show every tract of *land upon which payment has been made under the original verdict?* A. Yes, sir. * * * Mr. Ball: I want to object to that question. Court: Proceed. Mr. Ball: The Federal Investment Company objects to that last question. Whether this map shows or doesn't show such tracts, as the owners have paid the former assessments on, for the reason that this defendant is entitled in this hearing to all the rights under the charter law that it would have had if it had been brought *in the original proceedings in the Municipal Court*, and had appealed from the original judgment in the Municipal Court; *and under the Charter it has a right to a finding of this jury, as to all of the proportional benefits of this property as compared to all the property in the benefit district and as to this defendant the finding of the jury in the Municipal Court, or the amount of the payments in paying the amount found in the Municipal Court, have no binding force or effect on this defendant at all; and it is incompetent for the purpose of ascertaining the benefits that may, if any, be found by the jury accruing to the property of the defendant.* Court: The objection will be overruled." To which ruling and action of the court the defendants, Federal Investment Company and the other defendants severally and by their counsel then and there excepted (Transcript of Record, 98).

And again appellants offered testimony to show the inequality and injustice of the assessments made by the jury under Ordinance 3209. The court sustained the objection to the introduction of this testimony, and ruled that it was incompetent in the supplemental proceeding (Transcript of Record, p. 135).

And again plaintiffs in error made the following offer:

"Mr. Taylor: I offer to show by this witness that even as-

suming that the amount of the damages allowed by the jury in the former case is the standard that has to be taken in this case, that is the proportion of those damages that have been assessed upon property that has already paid is an unqualified and wrong proposition; this, for the reason that the defendants now in court have a right to be heard, not only upon the question of the amount of damages which should be allowed, *but also should be allowed to be heard upon how those damages should be distributed over the property in the benefit district.*" Mr. Petherbridge: "The city objects to that as incompetent, immaterial and irrelevant." Court: Sustained. To which ruling and action of the court the defendants severally by their counsel then and there excepted (See Transcript of Record, pages 136-137).

The trial court instructed the jury as follows (See Transcript of Record, pages 142-143): "The jury are instructed that this is a supplemental proceeding to assess certain benefits, if any, in the matter of the proceedings to open and widen Sixth Street from Broadway to Bluff Street, under Ordinance No. 7539, approved February 8, 1911, which is supplemental to the proceedings under Ordinance No. 3209, approved October 19, 1909. You have nothing to do with the assessment of the amount of the compensation for the land and improvements taken or damaged; that has been done by a former jury in the original proceedings to open and widen this street, the total of which amounts to $166,299.57. A part of that amount has been paid by the property owners in the benefit district whose land is chargeable therewith; such payments are shown on the map or plat of the benefit district introduced in evidence; but there still remains a balance of such compensation amounting to $76,981.98, which has not been paid as benefits. This balance you may assess against the city generally, including any benefit to any property of the city within the benefit district, and against such of the remaining private property, lots, tracts and parcels of land, exclusive of the improvements thereon, in the benefit district, as you may deem is benefited, if any, and in the proportion which you may deem the same benefited, by the opening and widening of Sixth Street, and upon which no assessments have been paid under the original proceedings." ("Given.")

Which instruction numbered "2" the court gave over the objections and exceptions of defendants.

Thereafter the jury came into court and asked for additional instructions, and thereupon the court gave them an additional instruction, as follows: "Upon your request for further instruction in regard to your duties as to assessing benefits in this proceeding, *you are instructed that you may not assess any benefits in this supplemental proceeding against any property in the benefit district, which was adjudged in the original proceedings to have been damaged by reason of a part thereof being taken for the widening of Sixth Street from Broadway to Bluff Street.*" This instruction was duly excepted to by the plaintiffs in error (See Transcript of Record, p. 156).

Plaintiffs in error requested the trial court to instruct the jury that they were entitled under the provisions of the Fourteenth Amendment to the Constitution of the United States "to introduce evidence and be heard upon the questions (a) *of the cost of improvement in question, to pay which such benefits are to be assessed*, and (b) *of what proportion of the total benefit, if any, of said improvement should be assessed against other property in the benefit district—that upon the plat on which was marked the word 'paid' as well as all other property;* and you are further instructed that inasmuch as said company has been denied the right to introduce evidence or be heard upon such question, you will not assess any benefit against said property of said company." This request was denied and exception saved (See Transcript of Record, p. 151).

The Union Pacific Railroad Company requested the court to instruct the jury as follows (See Transcript of Record, p. 145):

"The court instructs the jury that, under and by virtue of the provisions of the charter of Kansas City, Missouri, the property owners, owning property in the benefit district to be assessed to pay damages, have the right to be notified by proper and legal notice of the pendence of such proceedings to take private property and of the benefit district in which private property will be assessed to pay such damages; and you are further instructed that, in these supplemental proceedings, *there was no valid notice given to the property owners in the benefit district whose property was to be assessed to pay damages under and by virtue of the provisions of Ordinance 3209 read in evidence;* and you are therefore instructed that, to assess any benefits against the property of the property owners in the benefit district under these supplemental proceed-

ings *violates the provisions of the fourteenth amendment to the Constitution of the United States in that it is taking the defendants'* property in the benefit district without due process of law and denying to them the equal protection of the law; and you will therefore return a verdict in favor of such property owner and against the city in this proceeding." ("Refused.")

In the motions for new trial filed by the plaintiffs in error it was claimed that the proceedings under the supplemental ordinance deprived them of their property without due process of law, and denied them the equal protection of the law, in violation of Sec. 1, Art. 14, Amendments to the Constitution of the United States. And they invoked the protection of said Fourteenth Amendment as a defense to the proceedings under the supplemental ordinance (See Transcript of Record, pages 157-160-165).

The jury returned a verdict against all of plaintiffs in error in the supplemental proceedings which is set forth in the Transcript of Record, page 48.

The first assignment of error in the Supreme Court of the State of Missouri, was "that the court erred in overruling the appellants' objection to the introduction of any evidence in this proceeding." This objection has already been set forth and found in Transcript of Record, pages 50, 51, 55, 56, 57 and 58.

Assignment of Error IV. "The court erred in refusing to the appellant the right granted by the State and Federal Constitution and by the City Charter to be heard upon the question of the amount of damages.

Assignment of Error No. VII. "The court erred in giving to the jury at the request of the city, instruction given, and in giving each of said instructions.

Assignment of Error No. VIII. The court erred in refusing each of the instructions asked by the appellants that were refused.

Assignment of Error No. X. The court by its ruling deprived appellants of their property without due process of law in refusing to hear evidence on the question of the value of the property taken or damaged under Ordinance 3209, in violation of the Fourteenth Amendment to the Constitution of the United States.

Assignment of Error XI. The court by its rulings denied the appellants the equal protection of the law in refusing to hear evidence of the value of the property taken or damaged under Ordi-

nance 3209, in violation of the Fourteenth Amendment to the Constitution of the United States.

Also the following Assignment of Error 5. Because this proceeding deprived the appellant of its property without due process of law and denies to it the equal protection of the laws of the land within the meaning of Sec. 30 of Art. 2 of the Constitution of Missouri and of Sec. 1 of Art. 14, Amendments to the Constitution of the United States of America (See Transcript of Record, 259-260).

The Union Depot Bridge & Terminal Railroad Company is in a different situation from the other plaintiffs in error in this case, in this, the assessment made under the original Ordinance No. 3209 was accepted by said company and paid. Thereafter, without any notice to said Union Depot Bridge & Terminal Railroad Company other than that contained in the supplemental Ordinance No. 7539, and the order of publication made, under that ordinance, the jury again returned an assessment of benefits against its lands in the benefit district of $4,186.31. The jury, under Ordinance No. 3209, certified that they had assessed all property in the benefit district with benefits which had accrued by those proceedings. The jury in the supplemental proceedings returned a joint verdict against Kansas City, Mo. Gas Company, Union Depot Bridge & Terminal Railroad Co., and the Maquis heirs (See Transcript p. 185). On discovering this second assessment these parties appeared in court and objected to the verdict. Thereupon the court recalled the jurors and gave an instruction that they should correct their verdict so as to show separate assessments against the property of each of the above named parties. Union Depot Bridge & Terminal Railroad Company then asked the court to instruct the jury that the said company was the owner of certain lands described, which are set out in the instruction, and further asked the court to instruct the jury, as follows: "The jury are further instructed that a portion of said tracts were assessed with benefits, by reason of the improvement proposed to be made by the jury in the original proceedings had and conducted under and by virtue of Ordinance No. 3209, approved, October 19, 1909, and that the said Union Depot Bridge & Terminal Railroad Company paid, or caused the same to be paid, and that the remainder of said lands were, by the jury in the former proceedings conducted under and by virtue of

said Ordinance No. 3209, found not to be benefited by said proposed improvement. You will therefore not assess said land so found by said verdict not to be benefited in said original proceedings with any benefits in these supplemental proceedings, by reason of the fact that the jury in the former proceedings found said lands not to be benefited thereby, and that said Union Depot Bridge & Terminal Railroad Company, by paying said assessment, accepted said verdict." This instruction was refused by the court and an exception duly saved (See Transcript, pages 185-186). Thereupon said company filed its motion for a new trial challenging the validity of the proceedings under Ordinance 7539. This motion was overruled and exceptions saved and it joined in the appeal to the Supreme Court of Missouri.

The Supreme Court in its opinion stated: "It is argued on behalf of appellants, who it must be remembered are not lot owners whose property was taken or damaged, but are lot owners whose property is assessed with benefits, that they are entitled to be heard as parties on the question of the amount of damages; that to deny them a hearing on that issue violates those constitutional provisions guaranteeing due process of law and equal protection of law. But this contention (with a number of related ones we will not enumerate) was squarely held in judgment in the Tuller-Sechorn case, and squarely decided against appellants. That case must be read with this, for we will not re-formulate or reproduce its doctrines. Appellants had due process of law in the trial *nisi* on the question of benefits. They attempted to show there were none and took the verdict of the jury thereon and on the amount, if any."

The plaintiffs in error have contended from the beginning of the trial in the Circuit Court of Jackson County, Missouri, that they were entitled to the notice provided by Sec. 2 of Art. 6 in the original proceedings, and that they were entitled to a legal notice, and the right to be heard in every step taken in that proceeding and that they had the right to offer proof to show the value of the property taken and to show the total amount of benefits to the entire benefit district, and how such benefits should be apportioned over the entire benefit district, in order that the jury might apply the proper ratio in this supplemental proceeding as provided for in Sec. 3 of Art. 6 heretofore set out.

Plaintiffs in error contend that they were deprived of such right by reason of the default of the city in failing to give them

proper notice under the proceedings of Ordinance No. 3209. That such notice was a jurisdictional fact and its absence rendered all the proceedings under Ordinance 3209 null and void as against them.

The trial court in its instructions did not require the jury to apply the same ratio in assessing the benefits against the property of the plaintiffs in error herein, which is provided for in Sec. 3, Art. 6 aforesaid. That in failing to require the jury to apply such rule in assessing benefits in this supplemental proceeding, the plaintiffs in error were deprived of their property without due process of law, and were denied the equal protection of the law.

The Union Depot Bridge & Terminal Railroad Company claim they are deprived of their property without due process of law in this; they accepted and paid the verdict rendered by the first jury which had assessed all the benefits its property would derive from such proposed proceedings, and therefore the supplemental ordinance and the order of publication thereunder were so vague and indefinite that they did not constitute notice to the said company that its property would be again assessed in said supplemental proceedings, and therefore as to it, such proceedings did not constitute due process of law. And that there was nothing in the said supplemental ordinance or the order of court to advise the Union Depot Bridge & Terminal Railroad Company that any further assessment was contemplated against its property, and it now claims that the verdict of the jury in said supplemental proceedings, in again assessing its property with benefits, violates the Fourteenth Amendment to the Constitution of the United States in that it deprives it of its property without due process of law and denies it the equal protection of the law, and also violates the 2nd clause of the Seventh Amendment to the Constitution of the United States.

All the plaintiffs in error herein contend that said supplemental ordinance and order of publication thereunder were so vague, uncertain and indefinite that they did not constitute notice of the pendency of such proceedings and that any assessment made in said proceedings against their property did not constitute due process of law, and that such proceedings denies to them the equal protection of the law.

Plaintiffs in error in the trial court and the Supreme Court of Missouri invoked the protection of the Fourteenth Amendment to the Constitution of the United States, as a shield against any assessments in said supplemental proceedings but such right was denied by the Supreme Court of the State of Missouri, and a writ of error was sued out in this court, and in due time the record was filed in this court.

ASSIGNMENTS OF ERROR.

Plaintiffs in error make the following assignments of error in this court for a reversal of the judgment of the Supreme Court of the State of Missouri:

(1) The Supreme Court of the State of Missouri, erred in holding that plaintiffs in error were not entitled to a hearing on the amount of damages under the provisions of Sections, 2, 3, and 6, of Article 6 of the Charter of Kansas City, Missouri; and that, in and by such ruling, the plaintiffs in error herein were deprived of their property without due process of law, and denied the equal protection of the law, in violation of the 14th Amendment to the Constitution of the United States, in this, that due process of law requires notice before hearing, and an opportunity to be heard, and that, by Section 2 of Article 6 of the Charter of Kansas City, Missouri, it is provided that the court shall make an order, appoint a day and place, for impanelling a jury to ascertain the compensation for property to be taken or damaged, and to make assessments to pay for the same, which order shall recite the number and title of said ordinance, with the date when it took effect, and contain a description of the property proposed to be taken or damaged, and also a description of the property contained in the benefit district, as described in said ordinance, and name the day and place fixed by the said court for impanelling a jury to ascertain the compensation for property taken or damaged, and to make assessments to pay for the same, and that a copy of such order shall be published in the newspaper at the time doing the city printing, for four successive weeks, the last insertion to be not more than one week prior to the day set for said hearing, and that no notice of said proceedings shall, in any case, be necessary to the validity thereof, except the publication of the order as herein provided. Notice so given by publication, shall be sufficient to authorize the court to hear and determine the cause, and make any finding or order, or render any judgment therein, etc. And by Section 3 of said article, the right to a hearing is given as follows: "Parties interested may submit evidence to the jury, and the latter shall examine the property to be taken, damaged and assessed." And by Section

6 of said article, the owner interested in any of the property taken or damaged, or the owner of any property assessed benefits, who shall feel aggrieved by the verdict of the jury, may, within twenty days from the time the judgment is confirmed, appeal to the Circuit Court of Jackson County, Missouri, at Kansas City, where the case shall be tried *de novo* in said Circuit Court; and that, in and by the original proceedings under Ordinance No. 3209, no valid and sufficient notice was given, as required by said Sec. 2, which fact was found by the Circuit Court of Jackson County, Missouri, in a proceeding to enjoin the collection of the benefit assessed against the property of the plaintiffs in error herein, and no notice was given to the property owners whose property was assessed for benefits in the district, as required by Section 2, of Article 6 of the Charter of Kansas City, Missouri, aforesaid; and that, in and by such proceedings, the said plaintiffs in error were denied a right to a hearing on the question of the amount of damages, and were denied the right of taking an appeal to the Circuit Court of Jackson County, Missouri, and having the same tried *de novo*; and that, in and by such proceedings, the court has denied to these plaintiffs in error, the right to the notice provided by said charter aforesaid; and in and by such proceedings, the trial court, and the Supreme Court of the State of Missouri, denied to the plaintiffs in error due process of law, and denied to them the equal protection of the law, in violation of the Constitution of the United States, in this, that they have been assessed benefits without any hearing, or an opportunity to be heard upon the amount of damages for property taken, and the amounts to be assessed against them as benefits to pay for the same; and that, in and by such proceedings, there was a want of notice, and that such proceedings, without such notice, did not constitute due process of law, provided for by the 14th Amendment to the Constitution of the United States; and that said decisions of the Supreme Court of the State of Missouri, denied to plaintiffs in error, a title, right, privilege and immunity held by the plaintiffs in error under the Constitution and Statutes of the United States; and that the Supreme Court of the State of Missouri decided against such right, title, privilege and immunity, to the manifest injury of the plaintiffs in error herein.

(2) The Supreme Court of the State of Missouri, erred in holding that the city had a right under the so-called supple-

mental proceedings held under Ordinance No. 7539, to assess property with benefits without the property being described in said ordinance, which it was claimed was not properly assessed, and which was omitted to be assessed, or wrongfully assessed, in the original proceedings; and in holding that Section 23, of Article 6, of the Charter of Kansas City, Missouri, warranted assessing benefits in such supplemental proceedings against the plaintiffs in error herein without awarding them a right to be heard on the amount of damages in the Municipal Court, deprived the plaintiffs in error of their property without due process of law, and denied to them the equal protection of the law, in violation of the 14th Amendment to the Constitution of the United States; and that the plaintiffs in error herein claimed said right, privilege, and immunity in the trial court, and in the Supreme Court of the State of Missouri, but the decision of the trial court and the decision of the Supreme Court of the State of Missouri was against said right, title, privilege and immunity so held by your petitioners under the Constitution and Statutes of the United States, and herein the court erred to the manifest injury of the plaintiffs in error herein.

(3) The Supreme Court of the State of Missouri erred in holding that as to the Union Depot Bridge and Terminal Railroad Company, the said supplemental proceedings were sufficient notice to it to give the court jurisdiction of said company to assess the benefits, notwithstanding that benefits had been assessed under Ordinance No. 3209, and had been paid by said company, and that, in so holding, the trial court and the Supreme Court of the State of Missouri deprived said Union Depot Bridge & Terminal Railroad Company of its property without due process of law, in that the said proceedings were not sufficient to give any notice to the said Union Depot Bridge & Terminal Railroad Company that its property would again be assessed in said proceedings, for, upon the face of the record, it had already been assessed under Ordinance No. 3209, and had paid said assessments, as shown by the records, and it was not named in the supplemental proceedings and said supplemental proceedings were intended to be brought for one purpose only—to correct errors and omissions made in the previous assessment under Ordinance No. 3209, which had been held invalid, and that there was nothing in said

supplemental proceedings, notifying the said Union Depot Bridge & Terminal Railroad Company that its property would again be assessed, and that the court, in so holding such proceedings to be sufficient, denied to the said Union Depot Bridge & Terminal Railroad Company due process of law guaranteed by the 14th Amendment to the Constitution of the United States; and that such right, privilege and immunity was claimed in the Supreme Court of the State of Missouri, and the decision of that court was against such right, privilege and immunity guaranteed by the Constitution of the United States, and herein the Supreme Court of the State of Missouri erred to the manifest injury of the plaintiffs in error herein.

(4) The Supreme Court of the State of Missouri erred in holding that Section 23, of Article 6, of the Charter of Kansas City, Missouri, authorized and permitted, under the so-called supplemental proceedings under Ordinance No. 7539, benefits to be assessed against persons who had never been made parties to the first proceeding, and who had not been served with the notice required by Section 2 of said Article 6, so as to give the court jurisdiction over the said parties, and over their property; and that, in and by such proceedings, as shown of record, no jurisdiction was acquired over the plaintiffs in error herein under the proceedings held under Ordinance No. 3209, and therefore, there was nothing that could be supplemented, and that, to give Section 23 of Article 6, of the Charter of Kansas City, Missouri, such construction, violates the provisions of the 14th Amendment to the Constitution of the United States, in this, that it takes the property of the plaintiffs in error without due process of law, and denies them a hearing in court which is authorized and provided for by Section 2 of Article 6, of the Charter of Kansas City, Missouri, aforesaid; and that, in and by such construction of said section, it permits the said Kansas City to violate the terms of Section 2, of Article 6, of its charter, and take from the plaintiffs in error herein the right to be heard under the original proceedings under Ordinance No. 3209, and to offer testimony as to the amount of damages and the benefits to be assessed against the property of the plaintiffs in error in said district; and that such construction permits the city to take advantage of its own wrong and thereby deprive the plaintiffs in error herein of a hearing given by Section 2 of said article, and

cutting them off from a right of a trial by the jury and the right to be heard and a right to offer proof as to the amount of damages to property to be taken, and deprives appellants of a right of trial by a jury of the amount of benefits to be assessed against the property benefited in the district; and that, in and by such construction, as applied to the proceedings under Ordinances Nos. 7539 and 3209, the court deprived the plaintiffs in error of a right to be heard, by the jury as to the total benefits to be assessed without any fault on their part, and denied them a right to introduce proof under the original proceedings, of the amount of benefits to all the property in the district without any fault on their part, but, by reason of the default of the city in failing to give them proper notice of the pendency of such proceedings and that, under the construction given to Section 23 of Article 6 of the Charter of Kansas City, Missouri, aforesaid, the Supreme Court of the State of Missouri denied to the plaintiffs in error due process of law, and denied to them the equal protection of the law guaranteed them by the 14th Amendment to the Constitution of the United States; and that, in so deciding against them in said proceedings, the court denied a right, title, privilege, and immunity given them under and by virtue of the Constitution of the United States.

(5) The trial court erred in refusing to permit the plaintiffs in error to show that the damages to the property proposed to be taken and damaged under Ordinance No. 3209, was not of the amount assessed by the jury; and the trial court denied the plaintiffs in error the right to be heard upon such question in the supplemental proceedings, and, in denying them such right, the court denied to them a right, title, privilege and immunity given them by the 14th Amendment to the Constitution of the United States, in that it denied them due process of law, and denied them the equal protection of the law, and this without any fault or negligence on their part, but wholly by the default of the city in not complying with the terms of Section 2 of Article 6 of the Charter of Kansas City, Missouri, aforesaid; and that said right, title, privilege and immunity was claimed by these plaintiffs in error in the Supreme Court of the State of Missouri, and the decision of the said Supreme Court was against such right, title, privilege and immunity, after said right, title, privilege and immunity had been claimed in the trial court and denied by said

trial court; and the Supreme Court of the State of Missouri denied them the right to be heard on the question of damages, and denied them due process of law, and equal protection of law guaranteed them by the 14th Amendment to the Constitution of the United States.

(6) The Supreme Court of the State of Missouri erred in holding that the notice given under Ordinance No. 7539, called the supplemental proceedings, was sufficient to constitute due process of law, as against the plaintiffs in error herein, and, in so holding, the court denied to the plaintiffs in error herein due process of law and the equal protection of the law, in violation of the 14th Amendment to the Constitution of the United States.

(9) The Supreme Court of the State of Missouri erred in holding that the city of Kansas City could institute supplemental proceedings under Section 23 of Article 6 of the Charter of Kansas City, Missouri, after a part of the appellants had instituted a suit in the Circuit Court of Jackson County, Missouri, to declare the assessment of benefits against their property null and void for want of proper notice, and in deciding that the judgment of the trial court was of no force and effect, and that the city could supplement proceedings that had already been held void between the city and the appellants herein without complying with the provisions of Section 2 of Article 6 of the charter aforesaid, denied to the plaintiffs in error the rights, privileges and immunities given and guaranteed by the Charter of Kansas City and by the law of the land, and, in doing so, the Supreme Court of the State of Missouri denied to the plaintiffs in error herein due process of law, in violation of the 14th Amendment to the Constitution of the United States.

(11) The Supreme Court of the State of Missouri erred in holding that the plaintiffs in error were bound by the decision in the case of *State ex. rel. Tuller* v. *Seehorn*, 246 Mo. 568, when the records of the court show that these plaintiffs in error were not parties to said suit, and were therefore not bound by such proceedings; and in holding that these plaintiffs in error were bound by such decision in a case in which they were not parties, denied to them due process of law guaranteed by the 5th and 14th Amendments to the Constitution of the United States, and further denied to these plaintiffs in error the equal protection of the law, in violation of the 14th Amendment to the Constitution of the United States.

Wherefore, plaintiffs in error ask by reason of each and every one of the foregoing assignments of error, that the judgment and decision of the Supreme Court of the State of Missouri in the above entitled cause be reversed and for naught held, and that the plaintiffs in error have and recover of the defendant in error all costs herein expended.

BRIEF AND ARGUMENT.

Plaintiffs in error contend that the decision of the Supreme Court of Missouri affirming the judgment of the trial court in the supplemental proceedings under Ordinance 7539 deprived them of their property without due process of law and denied them the equal protection of the law in violation of Section 1, Fourteenth Amendment to the Constitution of the United States.

I.

In condemnation proceedings property owners whose properties are sought to be charged with benefits to pay damages for property taken or damaged, are entitled to notice and opportunity to be heard in order to constitute due process of law.

St. Louis v. *Rankin*, 96 Mo. l. c. 505.
St. Louis v. *Brinkwirth*, 204 Mo. 302.
Davidson v. *New Orleans*, 96 U. S. 97.
Hager v. *Reclamation District*, 111 U. S. 701.
Londoner v. *Denver*, 210 U. S. 375.

(a) *Such proceedings are in violation of common law and common right, and the utmost strictness is required in order to give validity to them.*

Ellis v. *Railroad Company*, 51 Mo. l. c. 203.
Whitley v. *Platt County*, 73 Mo. 30.
Zimmerman v. *Snowden*, 88 Mo. l. c. 220.
Anderson v. *Pemberton*, 89 Mo. l. c. 65.
C. R. I. & P. Ry. Co. v. *Young*, 96 Mo. l. c. 42.
Williams v. *Kirby*, 169 Mo. 622.
Spurlock v. *Dornan*, 182 Mo. 242.
City of Tarkio v. *Clark*, 186 Mo. l. c. 418.

(b) *Section 16 of Article 9 of the Constitution of Missouri requires all courts to take judicial notice of the provisions of the charter of Kansas City.*

Walsh v. *Railroad Co.*, 102 Mo. l. c. 589.
St. Louis v. *Lang*, 131 Mo. 412.

(c) *Publication of the court's order for four consecutive weeks, the last insertion to be not more than one week prior to the*

date set for impaneling the jury was a jurisdictional fact necessary to give the municipal court jurisdiction to hear and determine the cause.

Section 2, Article VI, Charter of Kansas City.
Kansas City v. *Duncan*, 135 Mo. l. c. 580.
St. Louis v. *Brinkwirth*, 204 Mo. 302.
St. Louis v. *Rankin*, 96 Mo. l. c. 505 and cases cited therein.
St. Louis v. *Koch*, 169 Mo. l. c. 591.

In the case of *Kansas* v. *Duncan*, 135 Mo. l. c. 580, the same clause concerning notice by publication as contained in Section 2 of Article 6 aforesaid was before the court for interpretation. This case was an action to grade an alley in Kansas City. A property owner appealed from the judgment in the municipal court claiming that under the Charter of Kansas City the provision concerning notice did not operate equally on every individual in the community, because in one case the individual interested may receive personal notice of the pendency of the proceedings to take the land and in another case under precisely the same facts other individuals may only receive constructive service, according to the discretion or whim of the court. Section 5 of the charter provision required that when the mayor shall file a certified copy of said ordinance in the Circuit Court or with the clerk thereof, such clerk or a judge thereof shall fix a day and place for assessing the damages and benefits to arise from the proposed grading or regrading, and shall make an order reciting the title of the ordinance and stating the general object and nature of the ordinance, and also stating the limits within which private property is benefited by the proposed grading or regrading as proposed and determined by the order, and

> "said order shall be directed to all persons to whom it may concern, without naming them, notifying them of the day and place fixed for the ascertaining of damages and benefits to arise from said grading or regrading, and that unless they file their claim of damages as herein required they shall thereafter be precluded from making any claim on account thereof. A copy of such order shall be published in each issue of a newspaper at the time doing the city printing for ten days (Sundays included), the last insertion to be not more than one week prior to the day so fixed for said hearing."

The section further provides:

"The court or judge thereof may, at the time of making said order, further order that all or any portion of the residents of the city owning or having an interest in real estate fronting on the street, alley, avenue, public highway, or part thereof, proposed to be graded or regraded, or in the real estate within the limits of the district prescribed by the ordinance within which private property is deemed benefited by the proposed grading or regrading, be served with a copy of said order," etc.

The charter provision then provides:

"Notice so given by publication shall be sufficient to authorize the court or judge thereof in vacation to hear and determine the cause and to make any finding or order therein as though all the parties had been sued by their proper names and had been personally served."

In construing the effect of this notice by publication in condemnation proceedings, the Supreme Court said:

"The publication being all that was requisite to invest the court with authority to proceed in the premises, and being all, in fact, that does give that authority, the additional discretionary power (or privilege) vested in the court by the charter, that it may further order 'that all or any portion of the residents of the city owning or having an interest in real estate fronting on the street, alley, etc., * * * be served with a copy of said order, either by delivering to each of such owners a copy of the order, etc.,' could in no sense affect or impair the jurisdiction of the court acquired by the publication. * * * Jurisdiction being once obtained, by the order of publication made upon the filing of the certified copy of the ordinance providing for the proposed grading by the mayor, with the clerk of the court, as provided in said Section 5, that jurisdiction will not be disturbed by the exercise or non-exercise of the further privilege given to the court by said section to order personal service upon all interested resident owners, etc.; * * * nor will the charter existence of that nonessential privilege have the effect to invalidate the section on the ground that it contains a delegation to the court of legislative power or discretion.

Nowhere in the section is there a substitution of the will of the court in authorizing personal service on the individual whose property is to be affected for the service by publication provided therein upon which the jurisdiction of the court to proceed in the matter of the assessment of damages is founded. The additional notice which may be required by the court, whether given or not, neither enlarges nor diminishes the juris-

diction of the court, and is insufficient to defeat the validity of the section. The provision, no doubt, was dictated in the act, by that considerate and frequent practice of our courts, to require by an order, that plaintiff shall give actual notice to defendants whose whereabouts are known to be outside the jurisdiction of the court, to be affected by the judgment to be rendered upon publication notice duly authorized by express statute. That provision in the section was inserted as a mere precautionary suggestion to the court in the interest of perfect fairness, and was not intended as a delegation of power to the court, to determine which of two modes of service it would require in a given case.

Without that provision in the section the court could, under its general authority, have ordered personal service upon all the resident property owners to be affected in addition to the publication notice imperatively required by the charter, and with it included in the section, as is in this, the court could refuse or neglect to make the order; and in so doing, in nowise impair the force or validity of the judgment rendered requiring publication notice."

II.

This record shows that no legal notice was given to property owners in the benefit district of the proceedings under ordinance No. 3209, as required by Section 2 of Article 6 of the Charter of Kansas City, Missouri, and such property owners had no opportunity to be heard in said proceedings.

The validity of the notice given in the original proceedings was adjudged insufficient in the case of *Union Pacific Railroad Company et al. v. Kansas City et al.*, found in the Transcript of Record beginning at page 104. The judgment of the court in said cause was:

"That none of said plaintiffs were served with notice or process of any kind in said proceedings in the municipal court; that none of said plaintiffs had any knowledge thereof or opportunity to be heard therein, in person or by agent or attorney, and none of them had any knowledge of the findings of said proceedings until long after the verdict therein had been rendered and confirmed and judgment thereon rendered and the time within which appeals might have been taken therein had expired" (See Transcript of the Record, page 124).

"That said proceedings, verdict, confirmation thereof and judgment is as to these plaintiffs and each of them, and

as to their respective properties, inoperative and of no effect, and that the several assessments undertaken to be made and levied upon the plaintiffs' said several properties are void, *and that said municipal court in said proceedings had and acquired no jurisdiction therein of the plaintiffs or any of them, or of their said properties.*"

No appeal was taken from this judgment of the trial court and it is therefore final and conclusive between all the parties to said proceedings that the notice in question in said condemnation proceedings was insufficient in law to advise the plaintiffs in error of such proceedings, and that the municipal court acquired no jurisdiction over these plaintiffs in error and that the said proceedings, verdict, confirmation thereof and judgment as to the plaintiffs in said cause, and each of them, and as to their respective properties was inoperative and of no effect, and that the several assessments undertaken to be levied against the plaintiffs' several properties were void. It has been ruled a number of times that the judgment in condemnation proceedings is *res judicata* as to the particular facts held in judgment.

Union Depot Company v. *Fredricks*, 117 Mo. l. c. 148.
Burke v. *Kansas City*, 118 Mo. 309.
New Madrid County v. *Phillips*, 125 Mo. 61.

In the case of *State, ex rel Holden* v. *Gill*, 84 Mo. 248, the Supreme Court of Missouri passed upon various provisions which are now incorporated in our charter and held that there was but one cause, one proceeding, one order, one jury, one verdict and one judgment. The court says:

"If one of a hundred property holders appeal, however well satisfied with the verdict the other ninety-nine may be, the entire cause, by that appeal, is taken to the Circuit Court. It is but one cause, although in the proceeding each of a hundred parties has a distinct assessment for the compensation he may be entitled to, or the charge for benefits for which his property is liable. There is but one jury, one verdict, and one judgment. That judgment ascertains and determines the compensation to be paid to each person whose property is taken, and the amount of charge against each lot or parcel for benefit received, but it is nevertheless only one judgment. An appeal from the Circuit to the Supreme Court brings up the same cause that was tried in the Circuit Court and a reversal of the judgment is a reversal of it as an entirety. * * * So

far as the latter are concerned the proceeding is designed to make an equitable apportionment of charges for benefits. It is one proceeding, not many, one judgment and not several."

In the case of *Kansas City* v. *Mulkey*, 176 Mo. l. c. 247, it is said:

> "An appeal was taken by two of the parties interested in the result of that proceeding, and these appellants as defendants therein though not appealing are equally bound by the result of that appeal as though they had joined therein. This court has held in cases of this character that, upon a reversal, the whole verdict and judgment is set aside even though one person only prosecuted his or her appeal and the assessment of damages there made to each individual defendant as his or her interest in the property to be taken was made to appear, and that a new trial must be had as to all defendants upon the issues of the value of their property sought to be condemned."

In the case of *Kansas City* v. *Hennegan*, 152 Fed. 249, in speaking of the present Kansas City Charter, it is said:

> "The construction of Section 3 of said charter was directly involved in the case before the Supreme Court of Missouri. The substantive effect of that construction was that the condemnation proceeding against the various defendants presented the case of an indivisible unit to be tried by one and the same jury, unless trial by jury be waived and the jury must pass upon and make award as to the amount of damages for each and every piece of land taken or damaged and determine the benefits to be assessed against each piece of property within the benefit district. The whole finding must be embraced in one judgment. So much so is the judgment a unit it was held not only that in the event of an appeal by a single defendant from the award in the mayor's court the whole case, including each separate piece of property involved, must be gone over and tried *de novo*, but also, that if any error be committed in the progress of the trial in the Circuit Court prejudicial to the interests of any one of the various defendants suing out a writ of error, for which the judgment should be reversed, the reversal operates as a vacation of the entire judgment, necessitating, on remand, a trial *de novo* of the whole case from beginning to end, both as the the re-ascertainment of the amount of damages sustained by each owner whose property is taken or damaged, and the re-ascertainment and re-adjustment of the benefits to be assessed against each tract or parcel of land within the benefit district. * * * And

each party to be assessed for benefits is interested and concerned in seeing that as little damages as possible are assessed for the property to be taken; for in the proportion of the diminution of the fund to be paid are the burden of the subjects of assessment for benefits lessened."

Section 2 of the Charter of Kansas City provides:

"Any person having an interest in the real estate to be affected by the proceedings may upon application and entering their appearance be made parties thereto; but no notice of said proceeding shall in any case be necessary to the validity thereof, except the publication of the order as herein provided. Notice so given by publication shall be sufficient to authorize a court to hear and determine the case and to make any finding or order or render any judgment therein as fully as though all the parties interested at the time of taking effect of such ordinance or any time thereafter had been sued by their names and personally served."

In *Anderson* v. *Pemberton*, 89 Mo. l. c. 66, it is said:

"And it has been ruled that in such proceedings that they are proceedings in entirety, if void as to one of the parties in interest, void as to all. *Brush* v. *Detroit*, 32 Mich. 43."

In *Ellis* v. *Railroad*, 51 Mo. 200, when discussing the same point, it was said:

"In this statutory and summary proceeding, this legal *coup de main*, in derogation of common law and common right, the utmost strictness is required in order to give validity, and unless upon the face of the proceedings had, it affirmatively appear that every essential pre-requisite of the statute conferring the authority has been fully complied with, every step from inception to termination will be *coram non judice*."

On the same point see *Whitely* v. *Platte Co.*, 73 Mo. 30; *Solville* v. *Judy*, *Ib.* 651.

The Charter of Kansas City has entrusted the estimate of damages and the assessment of benefits to the same jury and there are many precedents for entrusting the performance of both duties to the same persons.

Bauman v. *Ross*, 167 U. S. (l. c.) 593, and cases cited.

III.

In the supplemental proceedings referred to in the transcript of the record, plaintiffs in error were denied rights accorded property owners in the benefit district in an original proceeding and their property taken without due process of law and they were denied the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

(a) *Plaintiffs in error were denied the right of participating in the selection and empanelling of the jury in the original proceedings, which were to assess and did assess the damages and apportion the benefits over the entire benefit district.*

(b) *Plaintiffs in error were denied the right to offer evidence in the supplemental proceedings tending to show the value of the property taken or damaged, which right they would have had if the proceeding had been a valid original proceeding.*

(c) *Plaintiffs in error in the supplemental proceeding were denied the right to offer evidence to show the entire amount of the benefits to all the property in the benefit district and how those benefits should be equitably apportioned.*

(d) *Plaintiffs in error were deprived of the right to have the jury in the supplemental proceeding apportion the benefits according to the same ratio to which they would have been entitled in an original proceeding, as provided by Section 2, Article 6 of the Charter of Kansas City, Missouri.*

(e) *Plaintiffs in error in this supplemental proceeding were denied the same right given to the property owners in the benefit district on an appeal from a judgment of the municipal court to the Circuit Court in an original proceeding.*

Section 23 of Art. 6 of our charter was construed by the Supreme Court of Missouri in the case of *State ex rel. v. Seehorn*, 246 Mo. l. c. 576, where it is said:

> "Section 23 of Article 6, authorizing supplemental proceedings, provides that 'Such supplemental proceedings shall be instituted and conducted as to the particular piece or pieces of private property sought to be acquired or assessed, in like manner and with like effect as in the original proceedings, and shall be known and described as "Supplemental Proceedings for the Purposes Specified in the Original Ordinance."'"

The language thus used as to the procedure in supplemental proceedings, when considered in the light of the large number of tracts of real estate and of the owners thereof to be affected, and the correspondingly increased liability to mistakes, leaves little doubt that the intention of the framers of the charter was to provide a remedy by which such mistakes could be corrected, while permitting the original proceedings, so far as regular, to remain in force and effect, *and that in supplemental proceedings brought for that purpose the property owners should be entitled to all the rights accorded to those whose property was assessed or taken in the original proceedings. Any other construction is unreasonable and would render such provisions of the charter invalid, upon the ground that it would deny to some owners of property rights conferred upon others of the same class.* In construing the statute the rule is, "The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to the intent" (2 Lewis Sutherland on Statutory Construction, 2 E. D. 362).

Applying this rule to the clause of the charter that supplemental proceedings shall be "instituted and conducted in like manner and with like effect as in the original proceeding," we are of the opinion that the same course of procedure should be followed in both cases, so far as practicable, and that the right of appeal was intended to be open to any any party in interest in a supplemental proceeding."

In discussing the first proposition it is necessary to determine what rights were given property owners in the benefit district in an original proceeding. The court will observe that under Section 2, Article 6, the city engineer is required to "make out and deliver to the clerk of the municipal court a statement by plat, map or otherwise, containing a correct description of the several lots or parcels of private property to be taken or damaged, with the respective names of the owners, etc." Thereupon the court shall by order appoint a day and place for empaneling the jury to ascertain both the compensation for the property taken or damaged and to make assessments to pay for the same. The order shall recite the number and title of said ordinance with the date when it took effect, and contain a description of the property to be taken damaged as contained in the ordinance, and also a description of the property contained in the benefit district as described in said

ordinance and naming the day and place fixed by said court for empaneling a jury to ascertain the compensation for the property to be taken or damaged, and to make assessments to pay for the same, "which order shall be directed to all persons whom it may concern without naming them." "A copy of such order shall be published in a newspaper at the time doing the city printing for four successive weeks, the last insertion to be not more than one week prior to the day set for said hearing."

This section also provides:

"Any person having an interest in the real estate to be affected by the proceedings may, upon application and entering their appearance, be made parties thereto; but no notice of said proceedings shall in any case be necessary to the validity thereof, except the publication of the order as herein provided."

Section 3 of Article 6 provides:

"Parties interested may submit evidence to the jury and the latter shall examine personally the property taken, damaged and assessed."

Section 6 of Article 6 provides:

"In case the city or any person affected by the proceedings, either as the owner thereof or interested in any of the property taken or damaged, *or as the owner of, or interested in any of the property assessed, shall feel aggrieved by the verdict of the jury, such party so aggrieved may, within twenty days from the time the verdict of the jury is confirmed, appeal to the Circuit Court of Jackson County, Missouri, at Kansas City.*"

This section provides for taking appeal by making an affidavit, etc., and for the filing of a transcript with the clerk of the Circuit Court of Jackson County, and then provides:

"And thereupon the said Circuit Court shall be possessed of the cause and said cause, unless dismissed, *shall be tried de novo* in said Circuit Court and have precedence over all other cases for trial." And the section further provides "Such trials on appeal are to be conducted in all respects and subject to the same rules and the same laws as the other trials had in the Circuit Court as fully as may be and the same record thereof made and kept."

The section also provides that the verdict of the jury shall conform to all requirements of Section 3 of Article 6, and that it shall have the same force and effect as therein specified, and "Shall be binding and conclusive upon all persons and parties concerned or interested in the proceedings, and no confirmation thereof by the common council shall be required."

Section 6 also provides that on appeal the jury shall consist of six men who shall be disinterested freeholders of the city and be chosen by the judge of the court. They shall before making their verdict examine personally the property taken and damaged and that to be assessed as benefits, etc.

Section 7 provides that in such appeals, the amounts assessed against the property benefited, shall bear interest only from date of such appeal.

> "*Any party or parties may appeal from the judgment of the Circuit Court in such manner as appeals are taken in other civil cases*, but the only bond required of the party appealing shall be one conditioned that should the judgment of the Circuit Court be affirmed by the appellate court, or should such appeal be dismissed, he will pay all costs of such appeal."

In the case of *City of Kansas* v. *Hill*, 80 Mo. 523, the language of the city charter involved in that case was as follows:

> "*Parties interested may submit proof to the jury, and the latter shall examine personally the property to be taken and assessed.*" In this case a property owner, by the name of Swope, owned property in the benefit district. One of the questions asked by Swope in such proceeding was as follows (l. c. 529): "Question: Does not the fact that the real estate proposed to be taken lies and has lain for a great many years on the line of Eighth Street and between the east and west parts of said street already opened diminish the value thereof?" The owners of the real estate objected to the question, which was sustained, and the defendant Swope saved an exception. On appeal to the Supreme Court of the state the charter provision was passed upon in the following language: "The charter expressly provides that: '*Parties interested may submit proof to the jury, and the latter shall examine personally the property to be taken and assessed.*' *Why may the parties submit proof if a jury are at liberty to disregard the same and make their findings from their own observation alone.* It would seem a farce to introduce evidence if it may be wholly

disregarded. Why go to all the trouble and expense if the jury may make the verdict from their own observation alone. We do not say or intimate what weight or importance the jury may or what it does give the proof so submitted, but when submitted we think it is their duty to consider it and not wholly disregard it."

In this same case it is further said:

"The City of Kansas was the actor, the parties plaintiff, in these proceedings, and all parties owning the property thus sought to be taken and assessed with benefits thereby is made party defendant in said proceedings."

And again in the same case it is said:

"The city instituted the proceedings in its own name, and although all parties owning property within the prescribed district are made parties defendant, yet the object and purpose of the proceeding is to impose and force a separate and distinct charge against each separate and distinct tract of land, and the owner of every such tract or lot, for the purpose of this proceeding, is treated *and held as a separate and distinct party defendant and as such must be held to be a 'party within the meaning of rule twenty, supra.'* His interest is adverse to that of the city and separate and distinct from every other party defendant and upon appeal, no reason, in principle or policy, is seen why he and the city may not make the stipulation and statement contemplated in rule twenty."

In the Hill case counsel for Swope asked a witness concerning the value of property sought to be condemned, but on objection of property owners the evidence was excluded, and on appeal in the Supreme Court Swope asked for the reversal of the case upon two grounds. The first ground for reversal was an objection to the number and competency of the jurors. The second ground was the trial court refused to allow the defendant Swope on cross examination to ask the following question: "Does not the fact that the real estate proposed to be taken lies, and has lain for a great many years in the line of Eighth Street and between the east and west parts of said street already opened, diminish the value thereof?"

In passing on the right of Swope to ask such a question, the Supreme Court says (l. c. 535):

"On the second point we are unable to see any valid reason why the question might not be asked and answered. Like any other fact it is a circumstance in the case, tending to show the value of the property in question, and might well be taken into consideration by the jury in estimating the value. * * * Its exclusion by the court, we think was error."

The court will observe that the charter provision in judgment in the Hill case is the same provision found in Section 3 of the present charter of Kansas City with the exception of one word. In the Hill case the charter then provided "*parties interested may submit proof to the jury*, etc.," while the language in Section 3 of the present charter above quoted provides "*parties interested may submit evidence to the jury*, and the latter shall examine personally the property to be taken, *damaged* and assessed." The only change in the provision in the present charter is the substitution of the word "evidence" for the word "proof," and in the present charter the word "damaged" is added to the last clause so as to make the present charter read "taken, damaged and assessed," while the old charter read "taken and assessed."

A part of Section 3 of the present charter is the same as Section 3 of the old charter. The charter provision set out in the Hill case, page 535, is as follows:

"That the jury shall first ascertain the actual damage done to each person or corporation, in consequence of taking of their property for such purpose, without reference to the proposed improvement, as the just compensation to be made therefor; and second to pay such compensation, assess against the city the amount of benefits to the city and public generally, inclusive of benefit to any property of the city and against the several lots and parcels of private property being benefited as determined according to the last section; each lot and parcel of ground to be assessed with an amount, bearing the same ratio to such balance as the benefit to each lot and parcel bears to the whole benefit to all private property assessed."

Section 3 of the present charter provides that to pay such compensation the jury "shall assess against the city the amount of the benefit to the city and public generally, inclusive of the benefit to the property of the city, and the balance of such compensation they shall assess against the several lots and parcels of private property within the benefit district, exclusive of improvements thereon,

deemed benefited by the proposed improvement, as determined according to the preceding section; each lot or parcel of ground to be assessed with an amount bearing the same ratio to such balance as the benefit to each lot or parcel bears to the whole benefit to all the private property assessed. Parties interested may submit evidence to the jury and the latter shall examine personally the property to be taken, damaged and assessed."

In the Hill case the trial court gave an instruction that the jury were the exclusive judges of the value of the property taken and the benefit to the property within said district and were not bound to "find in this case according to the evidence. Such evidence is only for the purpose of furnishing the jury information and they may wholly disregard the same and make their finding from observation alone," etc. In passing upon the propriety of giving such an instruction, the Supreme Court, after quoting the charter provision that parties interested may submit proof to the jury, etc., then says: "It may be conceded that if the parties interested decline to submit any proof to the jury it would be perfectly competent for them to make up their findings and assessments from their own personal examination of the property. The charter expressly makes it their duty to examine personally the property to be taken and assessed. This daty they must perform, whether the parties in interest submit their proof or declines to offer any. The object of the statute in this particular it would seem was to afford the jury this additional means of information, rather than to authorize them to ignore and disregard the common law source of information derived from testimony of competent and intelligent witnesses." This case expressly decides that a property owner whose property is assessed benefits has the right to *offer evidence as to the value of the property taken for proposed improvement as well as the benefits derived from such improvements.* In other words, the provision in the charter that *parties interested may submit evidence means,* any party to the proceeding shall have the right to submit evidence and if it is competent they are entitled to have it considered by the jury. There is no limitation in the charter which provides that only the property owner whose property is taken shall offer evidence as to the value of the land.

The Hill case has been followed in a number of cases in the Supreme Court of the State of Missouri. In the case of *Kansas*

City v. *Smart*, 128 Mo. (l. c. 283) the Supreme Court used this language:

> "Many witnesses testified orally as to the damages and benefits that would ensue or accrue to the various owners of property abutting on said boulevard. There was evidence to show that the benefit to the property owners would be direct and immediate and would enhance the market value of the property. On the other hand there was evidence tending to show that the taking of this strip for the purpose of widening this street would seriously damage the property of appellants without a corresponding amount of local benefit. There was also a strong conflict as to the benefit that would result to the city and public generally from the establishment of the boulevard. On the part of the city the testimony of a number of witnesses was to the effect that whatever benefit would come to the city would not be immediate but would follow later as the result of increased value of this property and could not be estimated in dollars and cents at the time of the trial, whereas the witnesses for appellants, some of whom were real estate men, testified that the benefit to the city and public would be anywhere from $200,000 to $1,000,000. * * * The value of the land actually taken, as found by the jury, was $100,000, and the damaged property not taken $41,000. To pay these sums, or $141,000, an assessment was made against the property in the benefit district, excepting the one dollar assessed against the city. Twenty-three thousand, five hundred dollars was assessed as benefits against the property of the appellants, Alice M. Smart and D. O. Smart, and they were allowed as damages about $22,900, their benefits exceeding their damages about $600.00."

In the case of *City of Kansas* v. *Knotts*, 78 Mo. 359, the record shows that Judge Gill, one of the circuit judges, was interested in the proceedings as a property owner in the benefit district and was liable to assessment for benefits. Judge Black was also a property owner and was interested in the suit and was therefore disqualified to sit as judge. Judge Black refused to transfer the case to Judge Gill for the reason that the record shows that Judge Gill was also a party to said cause. In passing upon whether Judge Gill was a party to the suit the court said:

> "According to the record Judge Gill was something more than merely interested in the suit; *he was a party defendant, legally served with process, and the record discloses two assess-*

ments against him for which execution is ordered. I am unable to perceive how a judge, who is a party to a cause, can properly discharge the functions of a judge in trying his own case."

In the case of *City of Kansas* v. *Baird*, 98 Mo. 215, which was a proceeding under the charter of Kansas City to widen and extend Broadway Street in said city, it was shown that some of the defendants were persons whose property was condemned by ordinance, and some of the persons owned property within the benefit district, which was to be assessed benefits. The appellants were owners of property taken and also of property assessed with benefits. In this case the court again cites the present charter of Kansas City, which provides "*Parties interested may submit proof to the jury*" etc., and the court says, "These charter provisions show clearly enough that in making up their verdict the jurors are to be guided by their own judgment as to damages and benefits, as well as by such information as they get from witnesses," citing *Hill* v. *Kansas City, supra.* And in its opinion on the motion for a rehearing the court quotes the charter provision which provides:

> "Each lot or parcel of ground to be assessed with an amount bearing the same ratio to such balance as the benefit to each lot or parcel bears to the whole benefit of private property assessed,"

and then says,

> "The damages for property taken being fixed and the benefits to the property at large deducted, the jury have the amount to be raised by assessment against private property. *Now how can the rule of apportionment declared by the statute be applied until the actual benefits are assessed both as to all the property and as to each parcel.*"

The term "parties interested," used in the Charter of Kansas City, has always been held to include parties in the benefit district whose property was to be assessed benefits as well as parties whose property was taken or damaged, and in no case has it ever been held that parties interested did not have the right to submit proof both as to the value of the property taken or damaged and the property benefited and how the benefits should be apportioned. This has always been the practice in the trial of these cases until the hearing of this supplemental proceeding. The term "party," as

used in Section 3 of the Charter of Kansas City, evidently includes any party interested, either as a property owner, whose property is taken or damaged, or a property owner whose property is assessed benefits, and this is especially emphasized by the fact that when providing for an appeal Section 6 does not confine the right of appeal to those whose property was taken or damaged, but gives the right of appeal to "*any party* affected by the proceedings, *either as the owner thereof or interested in any of the property taken or damaged, or the owner of or interested in any of the property assessed.*"

From the foregoing charter provisions and the decisions interpreting the same, it will be observed that in an *original proceeding*, under the charter, the property owner in the benefit district has the right to appear in the municipal court and there offer evidence both as to the value of the property taken or damaged and also what property is benefited, if any, in the district and how the benefits shall be equitably *apportioned among the property owners in the entire benefit district.* That any property owner in the benefit district who feels aggrieved by the judgment of said municipal court has the right to appeal to the Circuit Court, and this appeal takes up the entire case to the Circuit Court and there the case is for trial *de novo*, and property owners in the benefit district have the unquestioned right to introduce any competent evidence they have, and if any property owner is dissatisfied with the verdict of the jury in the Circuit Court, such party has a right of appeal to the Supreme Court or the court of appeals as the case may be. Such are the rights of the property owner in the benefit district whose property is assessed benefits in the original proceedings.

The plaintiffs in error were entitled to have the benefits to their property, if any, determined by the ratio provided for in Section three of Article six of the charter heretofore copied. They were denied this right under this supplemental proceeding and the instruction of the court did not require the jury in this supplemental proceeding to assess the benefits according to the ratio provided by said section. The plaintiffs were denied the right of appeal in the original proceedings from the verdict and judgment in the municipal court to the Circuit Court and there have the case heard *de novo* in that court. In and by the interpretation of the provisions of Section 23 of the Charter of Kansas City, providing

for these supplemental proceedings, plaintiffs in error were held bound by the verdict of the jury in the original proceedings when it had been adjudged by the Circuit Court that no legal notice of such proceedings had been given and that said municipal court acquired no jurisdiction over them and in so construing Section twenty-three aforesaid the court has taken their property without due process of law and has denied to them the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

After the institution of the supplemental proceeding in the municipal court, a jury was impanelled and in time returned into said municipal court a verdict purporting to assess the sum of $168,004.57 (being the amount of the compensation found by the jury in the proceedings under ordinance 3209 to pay to the owners of the property taken or damaged) against the city and the property in said benefit district, including the property of plaintiffs in error in this case. The verdict in the so-called supplemental proceeding in the municipal court was in all respects precisely the same as to the amount of benefits as the verdict returned in the original proceedings. This verdict was confirmed and judgment rendered thereon by the municipal court as in the original proceeding. An appeal was then taken to the Circuit Court of Jackson County by the owners of property in the benefit district whose property had been assessed with benefits in the supplemental proceeding and who had not paid the assessments theretofore made pursuant to the provisions of Ordinance 3209. The case was assigned under the rules of the Circuit Court to division number three, over which Judge Thomas J. Seehorn presided. When the trial was begun in said division the judge announced it as his opinion that the case should be tried *de novo* "as though it were a trial of the proceedings under Ordinance 3209, and that there should be ascertained before him regardless of previous proceedings the amount of damages to be allowed for property taken or damaged and the amount of the assessments to be levied against property in the benefit district as benefits from the opening and widening of said street." Thereupon George S. Graham and others applied to the Supreme Court for a writ of prohibition and further proceedings before the said judge were suspended until a hearing on the writ was had in the Supreme Court of Missouri. That application of the property

owners in the benefit district for a writ of prohibition was heard and decided by the Supreme Court and is found in 246 Mo. beginning at page 541. The main question held in judgment in that case was as to the validity of the charter provision of Kansas City authorizing the municipal court to hear and determine condemnation proceedings. The second question was whether a writ of prohibition would lie under facts disclosed in the record. Both contentions were decided against the relators in that case. At the same time property owners whose property was taken in the benefit district gave notice that they would apply in the Supreme Court for a writ of prohibition and on application in the Supreme Court a peremptory writ was granted, which on hearing was made final and the opinion of the case is found in 246 Mo. beginning at page 568.

The case brought by the property owners whose property was assessed benefits is designated in the Supreme Court as the "Graham Case." The one brought by the property owners whose property was taken or damaged is known as the "Tuller Case." None of the plaintiffs in error herein were parties to the case of *State ex rel.* v. *Seehorn*, reported in 246 Mo. beginning at page 568. But in the Graham case the Supreme Court sustained the charter provision clothing the municipal court with power to hear the condemnation proceedings, and also ruled that the writ of prohibition did not lie because relators had complete remedy at law on the hearing of the case under the supplemental proceeding. In these two cases the Supreme Court construed Section 23 of Article 6 of our charter and decided, first:

> "The language thus used as to the procedure in supplemental proceedings when considered in the light of the large number of tracts of real estate and owners thereof to be affected and the correspondingly increased liability to mistake, leaves little doubt that the intention of the framers of the charter was to provide a remedy by which such mistakes could be corrected while permitting the original proceeding, so far as regular, to remain in force and effect, and that in supplemental proceedings brought for that purpose the property owners should be entitled to all the rights accorded to those whose property was assessed or taken in the original proceedings. Any other construction is unreasonable and would render such provision of the charter invalid, upon the ground that it would deny some property owners rights conferred upon others of the same class."

Therefore the court concluded that the property owners in the benefit district had a right to appeal from the judgment of the municipal court in the supplemental proceedings to the Circuit Court. But the Supreme Court further held that:

> "It seems obvious that the jury in the supplemental proceeding would have no authority to include in their verdict the estimated damages and benefits as found by the former jury, in regard to property not included in the supplemental proceeding, for, as only those whose property was omitted in the original proceedings were notified to appear in the supplemental proceedings, the scope of the verdict could not extend beyond such persons and their property. We are satisfied that the jury in the supplemental proceedings were without authority to include in their verdict assessments of benefits and damages upon property properly included in the first verdict."

And the court further ruled that the judgment in the original proceedings was valid as to those who appeared and who accepted it and did not become interlocutory merely because supplemental proceedings were necessary as to other property and be entirely vacated because an appeal was taken in such supplemental proceedings. The court further held that the *original proceeding when not appealed from became res adjudicata and not subject to trial de novo in the supplemental proceedings.* The court, by this ruling, cut off all rights of property owners in the benefit district in this supplemental proceeding, to offer evidence as to the entire benefits to all of the property in the benefit district, and to show what would be an equitable apportionment of such benefits over the entire district, and what was the ratio of benefit which the lots and parcels of land belonging to the plaintiffs in error bore to the entire property in the benefit district. This opinion held that if the property owners in the benefit district in the original proceedings under Ordinance 3209, had taken an appeal to the Circuit Court, then such appeal would have brought up the whole case *de novo;* and in such case the property owner taking the appeal would have had the right to offer evidence going to meet all the questions in the case. That is, to offer evidence on the question of the amount of damages as well as the amount of benefits to their property and the entire property in the benefit district, and the ratio between benefits to their property and the

benefits to all the property in the benefit district. And under the original proceedings they would have been entitled to have the jury assess their benefits in accordance with the rule laid down in Section 3, Article 6, *i. e.*:

> *"Each lot or parcel of ground to be assessed with an amount bearing the same ratio to such balance as the benefit to each lot or parcel bears to the whole benefit to all the property assessed."*

In the Tuller case the respondent, Seehorn, contended that a condemnation proceeding was an entirety and that the compensation to be allowed on the one hand and the assessment of benefits on the other should correspond exactly in amount, and that such results could not be secured if the compensation and benefits were not determined by the same jury. In answer to this contention the Supreme Court said, l. c. 583, first: as only the property not legally assessed in the original proceeding and the owners thereof were included within the provisions of the ordinance authorizing the supplemental proceedings, and such owners only are notified of the impanelling of the jury in the municipal court, it cannot be maintained that the jury so impanelled in the supplemental proceedings is *clothed with authority to balance damages and benefits when in so doing it would necessarily require an exercise of authority over persons and property not in court.*" And the court ruled in the supplemental proceedings that no evidence could be offered showing the amount of damages to the property taken, or benefits to property in the benefit district where the benefits assessed by the jury in the original proceedings had been paid by such property owner. But the effect of the court's ruling was that the property owners whose property was taken in the original proceedings and those whose property was assessed benefits and had voluntarily paid the same could not be bound by the supplemental proceedings because they were not parties to the same and had no legal notice of such proceedings, and were not parties thereto, and therefore under the well recognized rules the court had no jurisdiction over them in the supplemental proceeding.

Yet the court is inconsistent in the two opinions rendered in said case in that it held that although the plaintiffs in error in this case were not notified in the original proceedings and that

the municipal court never acquired any jurisdiction over them or over their property, in order to assess benefits, yet in the supplemental proceedings they were bound by the verdict and judgment in the original proceedings, and that it was *res adjudicata* as against them upon the question as to the amount of damages and the amount of benefits assessed by the former jury and which had been paid. It is conceded by the Supreme Court in its opinion in the case of *State, ex rel.* v. *Seehorn*, 246 Mo. 568, that the notice in the original proceeding was not valid and legal, and the court says, l. c. 573:

> "It was then discovered that the order of the municipal court for the impanelling of the jury was not published as required by the charter and that by reason of such defect, the collection of the unpaid assessments could not be enforced. An injunction suit, brought by the property owners who refused to pay their assessments, was tried with the result that the municipal officers were enjoined from enforcing the collection of such assessments."

The court will observe that the Supreme Court in the Tuller case, 246 Mo. l. c. 577, expressly ruled that it was the intention of the framers of the Charter of Kansas City, to provide a remedy by which such mistakes as herein complained of could be corrected, by permitting the original proceedings, so far as regular, to remain in force and effect, and that in supplemental proceedings under Section 23 brought for that purpose the property owner whose property was to be assessed benefits, under said supplemental *proceedings should be entitled to all privileges accorded to those whose property was assessed or taken in the original proceedings.* Yet the opinion found in 260 Mo. (last opinion) is inconsistent with such an argument because the distinctions made between the two proceedings do not give the property owner whose property is assessed benefits under the supplemental proceeding the same rights accorded to the property owners who were assessed benefits in the original proceedings. In the original proceedings the property owners in the benefit district had the right to appear and offer evidence and if dissatisfied with the verdict and judgment had the right of appealing to the Circuit Court and there have the case tried *de novo*. In the original proceedings the property owners had the right to show the entire amount of benefits to all the property in the benefit district and

how such benefits should be equitably apportioned over the entire benefit district. Plaintiffs in error were cut off from this right in the supplemental proceeding. The court held that they were bound by the amount awarded in the former verdict, to-wit, $168,004.57, and the court told the jury that eighty-nine thousand dollars of benefits had been paid by the property owners in the benefit district, and that the jury could not assess any benefits to any property which had paid this $89,000.00 in benefits. The court therefore held the plaintiffs in error in this case bound by the apportionment of the eighty-nine thousand dollars of benefits by the jury in the original proceedings when the plaintiffs in error were not before the court and the court had not acquired any jurisdiction over them or their property. In answer to the contention of Judge Seehorn in this Tuller case that the property owners in the benefit district should have their day in court on the question of the amount of the allowance to the property taken and damaged, the court say (l. c. 583):

> "In the exercise of the right of eminent domain in the taking of private property, as in the case in hand, the necessary parties are the city as the plaintiff, on the one side, and the property owner as the defendant, on the other. And while it would be entirely proper as a matter of grace to permit the owner of property in the proposed benefit district to aid the city in preventing an unduly high valuation of the property condemned, yet such owner would have no standing in court, as a necessary party" (Citing cases of *St. Louis* v. *Ranken*, *Kansas City* v. *Smart*, and *Goodrich* v. *Detroit*, 184 U. S. 432).

The proceeding under the St. Louis Charter is different from the proceeding under the Kansas City Charter.

Under the St. Louis Charter when the city proposes to condemn property it passes an ordinance providing for the proposed improvement and stating that it is necessary to condemn and appropriate for public use private property, and thereupon the city asks for summons to issue against the defendants whose properties are to be taken, giving them ten days notice of the time when the case will be heard and that at such hearing the court will appoint three disinterested commissioners to assess the damages which the said owners may severally sustain by reason of the condemnation proceeding. And the commissioners must ascertain and

describe a benefit district in which private property will be benefited and then give five days notice to property owners in the benefit district that said commissioner would make the assessments of benefits. There were two separate and distinct notices to be given. The Supreme Court held in the case of *St. Louis* v. *Brinckwirth*, that the commissioners acted as assessors for the municipality in determining the amount of special tax assessed against each tract of land. The court also held that there were two powers exercised in such proceedings, first, the power of eminent domain, and second, the taxing power, and that in the tax assessing branch of the proceedings the property owners were not parties to the condemnation proceedings. But in the Brinchwirth case the court says the "tax assessing branch of the proceeding depends for its validity upon a compliance with the law including the law requiring notice, or a certain kind of notice. Before benefits can be charged against property in the way of special taxes the case law generally requires a notice of some kind to the end that each property owner, at some stage of the proceeding, may be heard as to what proportion of the entire tax shall be assessed against his land," citing cases.

In the case of *Goodrich* v. *Detroit*, 184 U. S. 432, the city clerk was required to make and deliver to the attorney for the city a copy of the resolutions certified under the seal and the attorney thereupon is required to file a petition in the name of the city in the court having jurisdiction, which shall contain a description of the property to be taken and the extent and use of the improvements and the names of the owners and others interested in the property, etc., and the petition shall ask that a jury to be summoned and impaneled to ascertain and determine just compensation to be made, etc. Upon receiving such petition the clerk is required to issue a summons against the respondents named in such petition, etc." There was another separate proceeding under another provision of the statute which provided for the assessments of compensation for the property taken; but under said statutes there were two separate and distinct proceedings. This court in passing upon these provisions in the Michigan Statute says:

> "It will be observed that this section makes no express provision for notice to the owners of property not to be

taken, but assumed to be benefited by the improvements. These owners, however, are not then known, because the proceedings for the condemnation of the property taken precedes the determination of the benefits and the fixing of the assessment district. The sections of the statute taken together provide for two distinct and separate proceedings: (1) for the assessment of compensation for property taken, and (2) for the assessment of benefits to property not taken. In the former, only the owners of the land taken are interested."

But under the charter provisions of Kansas City, there is but one proceeding, one ordinance, one order of court, one notice, one jury, one verdict and one judgment, and in that proceeding the charter expressly provides "*parties interested may submit evidence to the jury,*" and, as we have heretofore shown, the term "parties," as there used, includes persons whose property is assessed benefits as well as property owners whose property is taken. It makes no difference that the property owner in the benefit district is not a necessary party, and the Supreme Court undertakes to say in its last opinion, "*that they were parties to the suit," and, if so, they had the right to introduce evidence whether the court called it a matter of grace or not.* It is immaterial whether the right is a matter of grace or not. It is given expressly by the charter and the court in its opinion discriminates between the property owners who are parties to the original proceedings and the property owners in the supplemental proceeding in the matter of assessing these benefits.

The Supreme Court, in this case, attempts to avoid the effect of its former ruling, holding that the notice to the property owners in the original proceedings was invalid. In order to avoid the effects of the adjudication that the municipal court acquired no jurisdiction in the original proceedings, the Supreme Court copies an excerpt from the decree in the Flynn case, which is the case of *Union Pacific against Kansas City, et al,* heretofore mentioned. The Supreme Court said:

"We ruled in the Tuller-Seehorn case, in effect, that lot owners whose property was subject to assessment in the benefit district were *not necessary parties to that part of the proceeding in the sense that the validity of the judgment depended on notice to them; that if the parties whose properties were taken or damaged in the original proceeding appeared*

to the notice and submitted to judgment, the amount of their damages became res adjudicata and were not open to further inquiry. * * *

It is argued that the Flynn case was *res adjudicata;* that the effect of the ruling in that case was to make void the entire original proceeding, hence there was nothing to supplement by the supplemental proceeding. If appellants' premises were true their conclusion might be allowed as sound. But under our rulings in the prohibition case, *supra,* the premises are not true, hence the conclusion is unsound. Hereinbefore we set forth the material parts of the Flynn decree and therefrom it appears that certain assessments alone were made void. The decree was cautious and precise in that regard. Now, in our judgment in the Tuller-Seehorn case the original proceeding so far as the amount of damages for property taken was concerned and so far as the assessments of benefits on lots whose owners acquiesced in the decree and paid the benefits were concerned, was upheld We but follow that ruling in disposing of the point in hand as we have done."

And the Supreme Court further held in this last opinion:

"It is well within a proper use of English to say that the assessments of lots within the district owned by persons who repudiated the proceedings were erroneously made or were omitted to be made in a true sense. To rule as appellants ask us would crib and confine the charter provision to bounds too narrow to meet the mischiefs at which it was aimed."

It was ruled that Section 23 applied to a case where the original notice of publication of the order of the court, in the original proceedings was void, because not made as required by the charter. The charter provision expressly says:

"No notice of said proceeding shall, in any case, be necessary to the validity thereof, except the publication of the order as herein provided. Notice so given by publication shall be sufficient to authorize the court to hear and determine the cause, etc."

And it was ruled in the case of *Kansas City* v. *Duncan, supra,* where this identical language was used, that such notice was necessary to give jurisdiction to the court, and that the additional service provided for by Section 2 of Article 6 was not jurisdictional. This was the meaning given the same language

as Section 2, which provided that parties owning or having an interest in real estate proposed to be taken or damaged *shall be served with a copy of said order of court at any time before the day fixed* for the hearing by leaving a copy with some member of the family, etc. The section further provides if such service of notice cannot be made upon any or all of such parties above described within such city, the return of such notice shall so state, and an alias notice may be *issued if the court deems it advisable.* But it is optional with the court whether it shall issue an alias notice or not. But personal service is not necessary to give jurisdiction to the court, because if personal service cannot be had no other publication of notice is required. The charter provides that no notice of such proceedings shall in any case be necessary, *except the publication of the order as therein provided.*

Again, in the opinion in Tuller case, in speaking of the notice in the original proceedings, the Supreme Court says:

> "The chancellor found a lack of notice and process (the order of publication required by the charter was not published a sufficient time) and that the several assessments made against plaintiffs' and interveners' properties were void because of such lack of service. Hence the municipal court had acquired no jurisdiction of them."

The foregoing opinion of the Supreme Court of Missouri above mentioned construing Section 23, Article 6 of the Charter of Kansas City, which authorizes supplemental proceedings, limits the rights of the property owners in the supplemental proceedings to a hearing only upon, what proportion of benefits their property should bear to the remaining portion of benefits assessed against property by the jury in the original proceedings which are unpaid. And the Supreme Court approved the instruction of the trial court which told the jury: "You have nothing to do with the assessments of the amount of compensation for the land and improvements taken or damaged; that has been done by a former jury in the original proceeding to open and widen this street, the total of which amounts to $166,299.57. A part of that amount has been paid by the property owners in the benefit district whose land is chargeable therewith; such payments are shown on the map or plat of the benefit district introduced in evidence; but there still remains a balance of such compensation, amounting to $76,981.98, which has not been paid as benefits. This

balance you may assess against the city generally, including any benefit to any property of the city within the benefit district, and against such of the remaining private property, lots, tracts and parcels of land, exclusive of the improvements thereon, in the benefit district, as you may deem is benefited, if any, and in the proportion which you may deem the same benefited, by the opening and widening of Sixth Street, and upon which no assessments have been paid under the original proceedings" (see Transcript of Record, p. 143). And after the jury had taken the cause under consideration for some time, they came back and asked the court whether they could assess any benefits to the remaining portion of the property not actually taken. The court gave the following instruction: "Upon your request for further instruction in regard to your duties as to assessing benefits in this proceeding, you are instructed that you may not assess any benefits in this supplemental proceeding against any property in the benefit district which *was adjudged in the original proceeding to have been damaged by reason of a part thereof being taken for the widening of Sixth Street from Broadway to Bluff Street*" (Trans. of Rec. 156). The Supreme Court in affirming the instruction just quoted deprived the plaintiffs in error of the same rule of assessment of benefits in the supplemental proceedings which was provided for in the original proceedings. There is no mention in these instructions of the rule prescribed in Section 3 of Article 6 aforesaid whereby the benefits to each lot or parcel "*shall be assessed with an amount bearing the same ratio to such balance as the benefit to each lot or parcel bears to the whole benefit to all private property assessed.*"

Such a rule could not be applied in the supplemental proceedings under Section 23, as interpreted by the Supreme Court of Missouri, and the Supreme Court by its interpretation of Section 23, deprived these plaintiffs in error of rights in the supplemental proceedings which were given to property owners in the benefit district in the original proceedings. The Supreme Court thereby makes an arbitrary classification of property owners in the benefit district, and gives rights to those in the original proceedings that is not accorded to the property owners in the benefit district in the supplemental proceedings.

Again, under the charter provisions in the original proceeding if these parties had been properly notified and made parties to such proceeding they would have the right to offer evidence to show the

amount of benefits which should be assessed to such parts of the lots or parcels of ground which are not actually taken in the original proceeding. In the original proceeding and in the supplemental proceeding, the city sought to condemn a strip of ground forty feet in width and two blocks in length off the front of each lot on Sixth Street, between Broadway and Bluff Streets. And the rule is that the jury must first assess the damages for that part of the lot or parcel of ground taken or damaged and the value thereof, and then assess whatever benefits, if any, will accrue to the remaining portion of such lot or parcel of ground, by reason of the proposed improvement, and deduct this from the total amount of damages, and the net amount constitutes the amount of damages the jury must award. See *Kansas City* v. *Smart, supra, Kansas City* v. *Morton, supra.*

But in the case at bar in the supplemental proceeding the court expressly denied the right of the jury to assess any benefits to those parts of lots not taken by such proposed improvements because those benefits were supposed to have been assessed by a former jury. Hence the trial court in this case held the plaintiffs in error bound by the assessment of the jury in the former proceeding as to that part of the benefits accruing to the property not taken and these plaintiffs in error undoubtedly had the right to offer proof as to such benefits and have such benefits determined by the jury and considered by them in estimating the amount of benefits to be assessed against their property. Again the plaintiffs in error were deprived of their right to offer evidence as to the benefits to the entire district, and to all property in the benefit district, and how such benefits should be distributed, and plaintiffs in error offered to show even if "the amount of the damages allowed by the jury in the former case is the standard that has to be taken in this case;" yet the defendants "now in court have a right to be heard not only upon the question of the amount of damages that should be allowed, *but also should be allowed to be heard on the question of how those damages should be distributed over the property in the Benefit District*" (see Transcript of Record, page 137).

This right was denied by the trial court and plaintiffs in error offered to prove that the amount of benefits which were assessed against the Gregory Wholesale House at Third and Main Streets, in the original proceedings, showed gross inequality and gross injustice in such assessment. The court denied the plaintiffs in error the right to go into such question

of apportioning benefits against property which had already paid the former assessment (see Transcript of Record, page 135). It will thus be seen by this court that the plaintiffs in error never had an opportunity to be heard as to the original apportionment of benefits over the benefit district in the original proceedings, nor in the supplemental proceedings, and that the trial court held them bound by the verdict of the former jury both as to the amount of damages awarded and the total amount of benefits assessed, and that portion of the benefits amounting to over $89,000.00 assessed against property in the benefit district where the owners had paid the assessments. That is to say, that although in the case of *Union Pacific Railway Company, et al.* v. *Kansas City*, the trial court had found that the municipal court never acquired any jurisdiction over the plaintiffs in error, or their property, and that the city had never given them any notice of such proceedings, and that such proceedings were null and void as to them, yet the trial court in the supplemental proceedings held that the "plaintiffs in error were bound by these several assessments made by the former jury aggregating $89,317.58," and that no change of such assessments or a re-assessment of such property could be made by this jury.

The court told the jury that there was a balance of $76,981.98 of benefits which had not been paid and this balance the jury should assess, first against the city such benefits as it may derive from the proceedings, and the remainder the jury will assess against the private property in the benefit district "as you may deem is benefited, if any, and in the proportion that you may deem the same benefited and upon which no assessments have been paid under the original proceedings." The trial court by such instruction fixed the amount of benefits which the jury had to assess and left nothing for the jury to do except to apportion that amount against the property in the benefit district which had not paid the assessments made by the former jury. Neither were the jury allowed to follow the charter provision and assess the total amount of damages for the property taken, and then assess the benefits by reason of said improvements, if any, to the remaining proportion of said property not taken by said proceedings. The plaintiffs in error would have the right to have the jury consider benefits to such property in an original proceedings; but in this supplemental proceeding the Supreme Court ruled that it made no difference that this jury considered the $89,317.58 had not been properly apportioned against the property which had

paid benefits to that amount. The jury were not permitted to make any change in such assessments. The plaintiffs in error were thus compelled to accept the verdict of the former jury as to the apportionment of that part of the benefits mentioned, although they were not parties to that proceeding and the municipal court had acquired no jurisdiction over them. Plaintiffs in error claim that in and by such construction of Section 23 of the charter aforesaid, they were deprived of their property without due process of law and denied the equal protection of the law. It is no answer to the contention of plaintiffs in error that the assessments of damages by the jury is the exercise of the power of eminent domain while the assessing of benefits is the exercise of the power of taxation. It is not a question of the kind of power or the source of the power which is complained of, but it is the way in which that power has been exercised. Under the construction placed upon Section 23 by the Supreme Court, it matters not how gross and erroneous that apportionment was made by the former jury, the plaintiffs in error in the supplemental proceeding must accept such apportionment although they have been cut off by the wrongful act of the city in not giving them legal notice from any right to any hearing upon such apportionment.

The construction which the Supreme Court has placed upon Section 23 arbitrarily divides the property owners in the benefit district into two classes. Those in the original proceedings had the right to be heard in the introduction of testimony before the jury showing the total amount of damages sustained and the total amount of benefits, if any, and how those benefits should be equitably apportioned over all the property in the benefit district, and they had the right to show that their property was not benefited any more or not as much as other pieces of property in the benefit district which were assessed benefits in much smaller amounts but the owners had accepted and paid the same. Or, they had the right to offer proof to show that pieces of property in the benefit district located near the proposed improvement would derive much greater benefits from such improvement than their property situated much farther away. Yet this right was denied these property owners in the supplemental proceedings because there was no uniform payment of benefits in certain parts of the benefit district by property owners whose property was adjacent to the proposed improvement. Those who paid benefits were scattered over the entire district, as shown by the evidence introduced in this record.

In the case of *City of St. Louis* v. *Meyer*, 77 Mo. 13, the facts showed that prior to the institution of such proceeding the city had attempted by agreement to dedicate a part of the street for public use. Thereafter the city instituted a condemnation proceeding and acting upon the idea that this street had been dedicated for public use did not seek to condemn that part taken in the former proceedings, and the commissioners recognizing the dedication by agreement, as having been made on the condition that said Ninth Street should be opened up north and south of the land dedicated without any expense to the owners of the lots in said Kingsland Addition lying east and west of said dedicated strip, did not assess any benefits against said lots. No assessments were made by the commissioners against said lots, and some property owners were dissatisfied, and appealed the case to the Supreme Court and the question arose as to whether said agreement was valid. The Supreme Court, in passing upon the validity of such agreement, says:

> "Kingsland knew that if all parties dedicated a strip sixty feet through their land, no condemnation could take place, and no benefits could be assessed, and he also knew that if they did not make such dedication, and it became necessary to condemn their land, he would be liable to be assessed with benefits, although he should give a strip for Ninth Street through his land. Nor could his legal representatives rightfully escape an assessment for benefits by appearing before the commissioners and consenting to the opening of Ninth Street through their land upon condition that they should not be assessed. *Such an arrangement is an evasion of the law and may render unequal and partial the special tax assessed to pay the damages awarded for land taken.*"

In the case of *Stewart* v. *Palmer*, 74 N. Y. 183, it was held that a state statute providing for certain local improvements and for the assessment of benefits to pay therefore, did not provide for due process of law, and was therefore unconstitutional.

In the course of the opinion in that case, the court unhesitatingly announced that the persons to be assessed with benefits have the unequivocal right to have the benefits justly apportioned between property owners within the benefit district, and that if one property owner is required to pay more than his fair proportion, his property is taken without due process of law, for the benefit of others. The court says (page 189):

"But in all cases there must be apportionment of the burden, either among all the property owners of the state, or of the local division of the state, or the property owners specially benefited by the improvements. *In either case, if one is required to pay more than his share, he receives no corresponding benefit for the excess, and that may properly be styled extortion or confiscation. A tax or assessment upon property arbitrarily imposed without reference to some system of just apportionment could not be upheld.*

Assessments for local improvements can be justified only upon the theory that the lands upon which they are laid are specially benefited by the improvement, for which they are laid and hence ought to bear the burden rather than property generally; and if a law should authorize such assessments to be laid, without reference to benefits, it would either take property for the public good, without compensation, or it would take property from one person for the direct benefit of another, and in either aspect it would be unconstitutional * * * *Taxation and assessment imply apportionment. Each person must share the burden of taxation and assessment equally with all others in like situation.*"

We think this case is governed by the decision in the case of *Spencer* v. *Merchant*, 125 U. S. 345. An assessment had been declared valid by the Supreme Court of New York in 100 N. Y. 585, and the case was brought to this court by a writ of error. A decision had been rendered in the case of *Stewart* v. *Palmer*, 74 N. Y. 183, holding a prior assessment null and void. Thereafter in 1881, the Legislature passed an act assessing a sum equal to so much of the original assessment as remained unpaid, adding a proportional part of the expense of making that assessment, interest, etc. The Legislature provided that the assessment should be levied and equitably apportioned by the supervisors of the county upon and among the lots which had not paid any assessments after *public notice to all the parties interested to appear, etc.* The Court of Appeals of New York held the statute valid upon the ground that the Legislature was supreme in its power of taxation and that it had the power to determine the amount to be assessed and the property which was especially benefited by such proceedings. The Legislature of New York determined, as a matter of fact, that the lands were benefited so much, and left the apportionment to certain appraisers. The Court of Appeals of New York said that the power of taxation by the Legislature was unlimited so long as it was

exercised for public purposes, and that the Legislature itself had a right to make a reassessment describing the benefit district and the amount it would be benefited. The Court of Appeals held that no hearing would alter the decision of the Legislature or be of any avail to review or change it. This court, in affirming that judgment, said:

> "That the power to tax belongs exclusively to the legislative branch of the government."

And, again:

> "That the Legislature in the exercise of its power of taxation has the right to direct the whole or a part of the expense of the public improvement, such as laying out, grading, or repairing a street to be assessed upon the owners of land benefited thereby and the determination of the territorial district which should be taxed for local improvement, is within the province of the legislative decision."

This court further held, that, in the Statute of 1881, the Legislature itself determined what lands were benefited and should be assessed, and that inasmuch as the Legislature had determined that question, no hearing could change that determination and therefore the statute of New York, in question, was not unconstitutional. There was a dissenting opinion by Justice Mathews and Justice Harlan. The dissenting opinion says:

> "By this act, therefore, the owners of the land in question were deprived of the opportunity of being heard upon the question, whether the apportionment as between them and the other land owners embraced within the original assessment district for the same improvement was equitable and fair. They were, therefore, deprived by the Act of 1881, of the very thing of which they were deprived by the Act of 1869, on account of which the Court of Appeals of New York held the latter act to be unconstitutional and void."

The above case clearly holds that the contention of the plaintiffs in error in this case raises a federal question: that a judgment of the highest court of a state, sustaining the validity of assessment upon land under a statute of the state or municipal charter, which was alleged to be unconstitutional and void because it afforded the owners no opportunity to be heard upon the whole amount of the assessment, *involves a decision against a right claimed under the Fourteenth Amendment to the Constitution of the United*

States prohibiting the taking of property without due process of law and the decision of said court may be reviewed by this court on writ of error, although the Constitution of the state contains a similar provision and no constitutional provision is specifically stated in the record of the state court.

In the case at bar the plaintiffs in error claim that the proceeding under the supplemental ordinance, which was authorized by the Charter of Kansas City, was void because it afforded to these property owners no opportunity to be heard upon the whole amount of the assessment, and it also is void because the court could *not apply the same ratio in* determining the amount of benefits to be assessed against their property, which is provided for in Section 3 of Article 6 of the Charter of Kansas City, Missouri. The plaintiffs in error contend that the case of *Spencer* v. *Merchant*, is, also, authority in their favor for the reason that there is a distinction between the proceeding in this case and the proceeding in the case of *Spencer* v. *Merchant, supra.* There is a clear distinction between a proceeding where the State Legislature itself fixes a tax and also prescribes upon what property the same shall be assessed, and a proceeding in a court where the court must ascertain the amount of benefits and the distribution of the same according to rules prescribed by the law-making power. In the first instance, there is no provision for a hearing, as a hearing would not avail anything because the legislative power is supreme. In the second instance, the tribunal acts in a judicial capacity and a hearing is prescribed and given to the property owners.

> See case of *Davidson* v. *New Orleans*, 96 U. S. 97.
> *Hagar* v. *Reclamation District*, 111 U. S. 701.
> *Londoner* v. *Denver*, 210 U. S. 385.

The proceeding provided by the Charter of Kansas City belongs to that class where the proceeding is of a judicial nature. This case is, therefore, clearly distinguished from the Act of the Legislature in the case of *Spencer* v. *Merchant*. In this case the original ordinance prescribed and fixed the benefit district within which private property should be assessed. A proceeding was had under that ordinance but no proper hearing was given to these plaintiffs in error and the assessments made under such proceeding were held null and void. Thereupon, the city undertook to correct such assessment by this supplemental proceeding under Section 23, heretofore quoted.

The court will observe that the common council in and by the supplemental ordinance did not create a new benefit district and embrace in that district only the property owners who had not paid the assessments made under the original proceedings. The common council adopted the same district provided for in Ordinance 3209. Ordinance 7539 simply refers to the benefit district prescribed under Ordinance 3209. There was no particular property mentioned or described in said supplemental ordinance upon which benefits should be assessed.

We, therefore, contend that the decision in the case of *Stewart v. Palmer*, 74 New York, 183, is in point in this case. Here no legislative body declared that only the property in the benefit district which had not paid assessments, would be benefited $76,981.98 by the proposed supplemental proceeding, but the court, in its charge to the jury, told it in effect that the property in the benefit district which had not paid any assessments was benefited in the sum of $76,981.98 and told the jury to distribute that amount in assessment against the property in the benefit district which had not paid the assessments made by the former jury; that this jury had nothing to do with the assessment of damages, and that $89,317.58 of the benefits assessed by the jury under the original proceedings had been paid, and it could assess no benefits against the property where such assessments had been paid. The court, also told the jury that it could not assess any benefits against the property taken or damaged, because that had been done by the former jury. The court, by such proceeding, compelled the complainants therein to accept the ascertainment made by the former jury, of which proceeding they were not notified, as required by the charter; and they were, also, required to accept the apportionment of the jury in the original proceedings to the extent of $89,317.58, although they were not notified of such assessment at the time the same were made, but were deprived of their right to be heard upon such apportionment, which is expressly provided for in Section 3 of Article 6 of the Charter, aforesaid. They were, also, deprived of the right on appeal, to offer evidence, both as to the amount of damages to be awarded and the amount of benefits to all property in the benefit district, which rights were given to the property owners in the benefit district on taking an appeal in the original proceedings.

This distinction is made by the Supreme Court of Missouri in construing Section 23 in the case of *Kansas City* v. *Land Company*, 260 Mo. l. c. 408, to reverse which judgment this writ of error is prosecuted. The Supreme Court decided that the only power given by the charter in these supplemental proceedings was to subject property which had been omitted by mistake, or illegally assessed in the original proceedings, "and leave the assessment on other property in the original proceedings, either with damages or benefits, to stand as regular and not to be tried anew on appeal in a supplemental proceeding, absent, appeal from the judgment in the original proceeding, as here, and present, a payment of benefits and an award of damages to persons appearing as here." The court thus denied the plaintiffs in error a hearing upon amount of damages to be awarded and benefits to be assessed in the supplemental proceedings on appeal, which was granted property owners in the benefit district in an original proceeding, where they appealed from the judgment of the jury in an original proceedings. The Supreme Court has thus arbitrarily divided property owners in the benefit district into two classes, and has denied a hearing in the supplemental proceeding, which is accorded to property owners in the benefit district in an original proceeding.

We think the case of *Londoner* v. *Denver*, 210 U. S. 373, is in point in this case. In the Londoner case, the city clerk had published a notice *inter alia* that if the property owner would file exceptions to such proceedings within thirty days, the city council would hear and determine such objections before the passage of any ordinance assessing the costs. Plaintiffs in error in that case filed a notice within thirty days, setting forth the various objections to the proceedings. After such notice was filed, the city council met as a board of equalization, and, without further hearing of evidence from the property owners making objections, adopted a resolution reciting that various persons, as owners of real estate, had filed complaints against assessments—for the cost of said pavement but the council found no complaint or objection had been made against the proportionment of said assessment made by the board of public works, and the said council, therefore, affirmed and approved the proportionment of said assessments made by the said board of public works, and without any further hearing or notice to the property owners, the said council enacted the ordinance of assessment, whose validity was questioned in the above

case by the property owners in the benefit district. The case went to the Supreme Court of Colorado and that court held the proceeding was valid, and on writ of error the case was brought to this court. This court held that the property owners had a right to introduce evidence in support of their objections and that the city council had denied such right and that such denial was a denial of due process of law. In passing upon this question this court said:

> "But where the Legislature of a state instead of passing the tax itself commits to some subordinate body the duty of determining whether, in what amount and upon whom it shall be levied, and of making its assessment and apportionment due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed the taxpayer shall have an opportunity to be heard, of which he must have notice either personal, by publication, or by a law fixing the time and place of the hearing. (Citing numerous cases.) * * * If it is enough that, under such circumstances an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar, *but we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in judicial proceedings may be dispensed with in proceedings of this nature. But even here, a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof however informal.*
>
> *Pittsburg, etc. Rd. Co.* v. *Backus*, 154 U. S. 426.
> *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112-171.
>
> It is apparent that such a hearing was denied to the plaintiff in error."

The case was reversed for that reason.

We, therefore, submit that the plaintiffs in error in this case were denied the right to be heard in the original proceedings and to introduce evidence upon the question of damages and benefits, and, especially the apportionment of the benefits over the entire district, and, also, what benefits were derived by the remaining portion of the property, from which the forty feet was to be taken to widen Sixth Street.

IV.

The Union Depot Bridge & Terminal Railroad Company submit the further propositions.

(1) The Union Depot Bridge & Terminal Railroad Company submit the further proposition, in addition to the foregoing, that a jury had already assessed all benefit, to-wit, under Ordinance 3209, and so certified in their verdict, and which had been paid, and that a reassessment under the Ordinance 7539 was a re-examination of a fact decided by a jury which could not be re-examined under the Constitution of the State of Missouri or under the second clause of the Seventh Amendment to the Constitution of the United States without denying said Union Depot Bridge & Terminal Railroad Company of its property without due process of law. *C. B. & Q. Rd. Co.* v. *Chicago*, 166 U. S. l. c. 242-3. And, (2), that the said Ordinance 7539 and the order of publication thereunder were so vague, indefinite and uncertain that they did not advise the said Union Depot Bridge & Terminal Railroad Company of any further assessment to be made against its property. Under the ruling of the Supreme Court of Missouri, the supplemental proceedings did not include those property owners against whom assessments were made by the jury in the original proceedings and who accepted said assessments and paid the same. For it was ruled in said case that "the jury in the supplemental proceedings were without authority to include in their verdict, assessment of benefits and damages upon property properly included in the first verdict." *State ex rel.* v. *Sechorn*, 246 Mo. l. c. 580. It had already paid its assessment under Ordinance 3209 and had accepted said verdict. And under the instruction of the court, the jury were told that they could not assess any benefits against property which had already been assessed and upon which the benefits had been paid. Yet, the jury were permitted in this supplemental proceeding, to make another assessment of benefits against its property without any notice other than the supplemental ordinance and notice thereunder to the said Union Depot Bridge & Terminal Railroad Company, that the city deemed any of its property had been omitted or that a proper assessment had not been made against this property. Plaintiffs in error therefore contend that the said Ordinance 7539, and the order of publication thereunder, were not sufficient to constitute due process of law against the said Union Depot Bridge & Terminal Railroad Company.

Bellingham B. & B. C. R. Co. v. *Whitcomb*, 172 U. S. 314.

It is no answer to this contention that the title to part of the land assessed benefits herein was in controversy when the original assessments were made. It was the duty of the jury to assess all benefits against each and every piece of property deemed benefited in the benefit district and Section 4 of Article 6 provides for a case where title to the property is in dispute. The fact there was a dispute over the ownership of part of the land in benefit district was no excuse for the jury to omit such land from assessment of benefits if it was benefited. The jury returned a verdict in the original proceedings saying they had assessed each piece of property they deemed benefited by said proceedings and the Union Depot Bridge & Terminal Co., accepted such assessment and paid the same. They were therefore not subject to the provisions of this supplemental ordinance, and were not parties to such proceedings under the decision of the Supreme Court in the Tuller case just mentioned.

In the case of *Voight* v. *Detroit City*, 184 U. S. 115, this court in passing upon the validity of proceedings under the Michigan statute said:

> "The common council proceeded as required by the ordinance. They determined that a portion of the city was benefited by the improvement, creating a district of the property benefited, declared also that $49155.12 was a just proportion for the compensation awarded by the jury to be assessed upon the property owners in the district created, and directed the board of assessors to make the assessment. The assessment roll was subsequently made out and was ratified and confirmed by the council and the assessment against property of plaintiffs in error was nearly $10,000.00."

Passing on the ordinance, the Supreme Court said:

> "No provision is made for a notice to property owners of a time and place of hearing upon either the question of fixing a taxing district or the question of the amount of the award to be spread thereon."

But the court observed that such notices were not necessary to vindicate the statute from the charge of being unconstitutional because "The statute provides for a hearing in relation to the *proportion each piece of property shall bear to the whole cost of the improvement and the proper notice of this hearing was given;*"

and further "When the proceeding has reached that stage where it becomes necessary to decide what proportion of the cost of such proposed improvement shall be assessed to any given described land, *there must be an opportunity given to the owner of the land to be heard upon that question.*"

The Voight case is a direct authority in support of the contention of plaintiffs in error in this case that they were entitled to a hearing in relation to the proportion each piece of property should bear to the whole cost of the improvement in the benefit district. Such a hearing was expressly denied, in this supplemental proceeding, so that the Voight case is authority in favor of the proposition advanced by the plaintiffs in error that they were deprived of their property without due process of law and denied the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

Defendants in error rely upon the case of *Willoughby* v. *Chicago*, 235 U. S. 45. There is no question of notice in this case and there was no contention that the plaintiffs in error had been cut off from any rights which they would have enjoyed under the first proceeding, so that the questions involved in deciding the Willoughby case do not apply to the questions involved in this case.

The case of *Seattle* v. *Kelleher*, 195 U. S. 351, does not apply to this case, but in this case this court said, "A re-assessment may be a new assessment." Whatever the legislature could authorize if it were ordering an assessment for the first time it equally could authorize notwithstanding a previous and valid attempt to assess. The previous attempt left the city free "To take such steps as were within its power to take either under existing statutes, or under any authority that might thereafter be conferred upon it to make a new assessment upon plaintiff's abutting property in any constitutional way." Citing *Norwood* v. *Baker*, 172 U. S. 279, and other cases.

In the case of *Norwood against Baker*, 172 U. S. 279, this court said:

> "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is to the extent of such excess, a taking, under the guise of taxation of private property for public uses without compensation."

And this court quotes from Cooley on Taxation the following:

> "There can be no justification for any proceeding which charges the land with an assessment greater than the benefits. It is a plain case of appropriating private property for public use without compensation."

And in the case of *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. l. c. 174, this court defines very clearly the difference between a proceeding where the legislature prescribed the district and makes the assessment, and a proceeding which is left to a court or tribunal to prescribe the district and make the assessment. This court says:

> "The legislature, when it fixes a district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefit to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, *i. e.* the amount of tax which he is to pay. *Paulsen* v. *Portland*, 149 U. S. 30, 41. But when, as in this case, the determination of the question of what land shall be included in the district is only to be decided, after a decision as to what land described in the petition will be benefited, and the decision of that question is submitted to some tribunal (the board of supervisors in this case) the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits and to have the land excluded, if the judgment of the board be against their being benefited. Unless the legislature decide the question of benefits itself, the land owner has the right to be heard upon that question before the property can be taken. This in substance was determined by the decision of this court in *Spencer* v. *Merchant*, 125 U. S. 335, 356, and *Walston* v. *Nevin*, 128 U. S. 578. Such a hearing upon notice is duly provided for in the act."

This language is quoted with approval in the case of *French* v. *Barber Asphalt Paving Company*, 181 U. S. l. c. 340-341, and the same rule is announced in the case of *Londoner* v. *City of Denver*, 210 U. S. 373.

We therefore submit that plaintiffs in error were denied due process of law and the equal protection of the law in this supplemental proceeding, in violation of Section 1 of XIV Amendment of the Constitution of the United States, and they ask that the judgment of the Supreme Court of Missouri, in said cause be reversed and for naught held and that they recover all their costs herein expended.

Respectfully submitted,

I. N. WATSON,
EDWARD WHITE,
H. M. LANGWORTHY,
KENNETH McC. DEWEESE,
Attorneys for Plaintiffs in Error.

ANDREW F. EVANS,
City Counselor of Kansas City, Mo.,
ARTHUR F. SMITH and
JESSIE C. PETHERBRIDGE,
Assistant City Counselor,
Attorneys for Defendant in Error.

APPENDIX.

The following sections are copies of the charter provisions pertinent to the issues in this case:

Sec. 2. Description of Property Taken or Damaged—Benefit Limits—Plat, Description and Names—Date Fixed for Empaneling Jury.

When any ordinance shall provide for taking or damaging private property for any public use specified in the preceding section, the city shall by ordinance describe the private property to be taken or damaged, and if the same is to be paid for wholly or in part by special assessments, shall prescribe the limits within which private property shall be deemed benefited by the proposed improvement, and be assessed and charged to pay compensation therefor; and thereupon the city engineer or one of his assistants shall make out and deliver to the clerk of the Municipal Court a statement by plat, map or otherwise, containing a correct description of the several lots or parcels of private property to be taken or damaged, with the respective names of the owners and parties interested therein so far as known, who may be such at the time said ordinance takes effect. Said court shall thereupon, by order, appoint a day and place for empaneling a jury to ascertain the compensation for the property to be taken or damaged and to make assessments to pay for the same, which order shall recite the number and title of said ordinance with the date when it took effect, and contain a description of the property proposed to be taken or damaged as contained in said ordinance and also a description of the property contained in the benefit district as described in said ordinance, and naming the day and place fixed by said court for impaneling a jury to ascertain the compensation for the property to be taken or damaged and to make assessments to pay for the same, which order shall be directed to to all persons whom it may concern, without naming them.

Notice, Publication of—Personal Service of—Parties.

A copy of such order shall be published in a newspaper at the time doing the city printing, for four successive weeks, the last insertion to be not more than one week prior to the day set for said hearing. The parties owning or having an interest in the real es-

tate proposed to be taken or damaged shall be served with a copy of said order, either by delivering to each of such owners or parties interested, at any time before the day fixed therein for the hearing, a copy of the order or by leaving such copy at their usual place of abode with some member of their respective families over the age of fifteen years, and in case of corporations, by delivering a copy to the president, secretary or some managing officer thereof, or to any agent of such corporation in charge of any office or place of business of such corporation in Jackson County, Missouri.

Parties Not Served, Alias Order Issued.

If service of such notice cannot be made on any or all of such parties as above described, within said city, the return on such notice shall so state, and thereupon an alias order specifying a different date may be made by said court, if deemed advisable, notifying such unserved parties of the facts as in case of the original notice above provided. Said cause may be continued or postponed from time to time. It shall not be required in any case to bring in any person other than the owners of the property or those interested therein who were such at the time of the taking effect of such ordinance; and the parties claiming or holding through or under such owners or parties interested, or any of them, shall be bound by the proceedings as fully as if they were brought in; but any person having an interest in the real estate to be affected by the proceeding may, upon application and entering their appearance, be made parties thereto; but no notice of said proceedings shall, in any case, be necessary to the validity thereof, except the publication of the order as herein provided. Notice so given by publication shall be sufficient to authorize the court to hear and determine the cause and to make any finding or order or render any judgment therein as fully as though all the parties interested at the time of the taking effect of such ordinance, or at any time thereafter, had been sued by their proper names and had been personally served.

* * * * * * * * *

Policeman May Serve Notice.

* * * After notice has been given as herein provided and upon the day fixed for impaneling a jury, or upon a day to which such hearing has been adjourned, the Municipal Court shall appoint and cause to be impaneled a jury composed of six men who shall be disinterested freeholders of the city, who shall receive such compensation as shall be provided by ordinance, which jury shall

hear the evidence and view the property to be taken and damaged, or assessed with benefits.

Sec. 3. Jury to Ascertain Just Compensation.

The jury impaneled under the provisions of this Article shall ascertain the just compensation to be paid as follows:

First: Actual Value, When.—For each piece of private property taken when the public use thereof shall be such that the city must have the exclusive possession and control thereof, the actual value of the property taken.

Second: Damage From Partial Use of Private Property.—For each piece of private property taken where the public use thereof may be such that the city need only have such possession and control as will not wholly exclude the possession and beneficial use thereof by the owner or owners, the actual damage from the public use specified in the ordinance.

Third: Damage When Use of City's Property Injures Private Property.—For all damages to each piece of private property not actually taken so as to give the city the possession or control of the same, the actual amount of the damages such property may sustain from the use of the private property taken for the public use for which it may be taken, including all that the city from time to time may do or cause to be done in, with, or upon the private property so taken.

Compensation for Private Property Used or Damaged—How Paid—Interested Parties May Appear—Jury to Examine Property—Removal of Improvements—Verdict, Signing and Form of—Duties of Engineer and Assessor:

To pay such compensation the jury shall assess against the city the amount of benefit to the city and public generally, inclusive of benefit to any property of the city, and the balance of such compensation they shall assess against the several lots and parcels of private property within the benefit district, exclusive of the improvements thereon, deemed benefited by the proposed improvement as determined according to the preceding section; each lot or parcel of ground to be assessed with an amount bearing the same ratio to such balance as the benefit to each lot or parcel bears to the whole benefit to all the private property assessed. Parties interested may submit evidence to the jury and the latter shall examine personally the property to be taken, damaged and assessed.

The party owning any property taken may remove any improvements thereon, and the jury may consider this fact in determining their verdict. The verdict of the jury shall be signed by each juror and delivered to the Muncipal Court and shall contain a correct description of each lot or parcel of private property to be taken and the value thereof, and of each lot or parcel of private property damaged and the amount of injury thereto, and also the amount assessed against the city, together with a correct description of each lot or parcel of private property assessed and the amount assessed against the same. The City Engineer and City Assessor or their assistants shall, when required, aid the jury to put their verdict in proper form, and the jury shall not be discharged until the Municipal Court is satisfied that the verdict is correct in form.

Sec. 4. Verdict Reported to Common Council—Confirmation—Time—Sums Assessed Against City—Appropriation For—Assessed Against Private Property, a Lien—Time of Payment—Not Paid in Time, To Bear Interest—Collected as Any Other Special Tax Or by Tax Bill—Procedure.

The Clerk of the Municipal Court shall, after the rendition of the verdict of the jury, report the same to the Common Council; and if the same be not confirmed by the Common Council within sixty days from the making of such report, the proceedings and verdict shall be void. If the verdict and proceedings be confirmed by ordinance within sixty days from the report of the Clerk of the Municipal Court, an appropriation shall be made to pay such sum as has been assessed against the city and the city shall have and hold the property sought to be taken for the purpose specified in the ordinance providing for the improvement, and the City Clerk shall give notice in writing of the fact of such confirmation to the Clerk of the Municipal Court; and the several amounts assessed by the jury against private property shall be a lien on the several lots and parcels of private property charged, from the date of the enactment of the ordinance providing for the improvement until paid; and if not paid within sixty days after the confirmation of the verdict, shall bear interest at the rate of seven per cent per annum, from the confirmation thereof, except as hereinafter provided, and shall be collected by the city as by ordinance provided, by suit or otherwise, as any other special taxes, or by special execution, as follows, namely: A special tax bill against any lot or parcel of property assessed may be issued by the Clerk of the Municipal Court,

under his hand, and his signature thereto shall be attested by the City Clerk under the seal of the City, which tax bill shall contain a description of such lot or parcel of property, and the amount assessed against the same as fixed by the verdict, and state that the assessment has been made to pay compensation for private property taken or damaged, or both, as the case may be, for the purpose specified in the ordinance providing for the improvement, giving the title of and date when the ordinance took effect, and that such assessment has been confirmed by ordinance, giving also its title and date when the ordinance took effect, and that such assessment shall bear interest as herein provided. Each tax bill, so issued, shall be filed in the office of the Clerk of the Circuit Court of Jackson County, at Kansas City, and by such clerk recorded and indexed as a judgment in favor of the city, against the property described in the tax bill. At any time after the filing and recording of any such tax bill, as aforesaid, a special execution may be issued thereon out of the said Circuit Court in vacation or term time, as on a judgment of the court in favor of the city, which execution shall recite the tax bill or the record thereof and state when the tax bill was filed and be directed to the Sheriff of Jackson County, and command him, in case the assessment, interest and costs be not paid to him, to sell the property therein described, or so much thereof as may be necessary to pay such assessment, interest and costs. The proceedings under such special execution shall, as far as practicable, conform to the proceedings on special executions on ordinary judgments foreclosing liens on land.

* * * * * * * * *

Tax Bill Subject to Order of Court—Title not Acquired Under Proceedings, Bill Set Aside—Proceedings in Case of Defect or Omission—Assessment Invalid in Part—Executions—Owner of Divided or Undivided Interest, May Pay Separately.

Tax bills filed and recorded as aforesaid shall be subject to the order of the court, and may be set aside or the amount of assessment reduced on motion of any party interested in the property assessed, the city having reasonabe notice of the filing of such motion and the object thereof. If no title can be acquired under the proceedings to any of the property sought to be taken, the court shall set aside any bill and assessment on motion. If by reason of any defect or omission in the proceedings the city cannot acquire title or right to any particular parcel of property, or to any in-

terest in any parcel of property sought to be taken, the court shall, on the fact being made to appear, reduce the assessment by deducting therefrom so much thereof as was assessed on account of the property or interest in the property sought to be taken, but not acquired, to be determined as far as practicable from the verdict of the jury making the assessment, and award execution for the residue. No assessment shall be affected or interfered with for the reason that any other assessment or assessments made in the same proceedings may be invalid in whole or in part. Executions and proceedings thereon shall be under the control of the court or judge, as in ordinary civil cases. The owner of any divided or undivided interest in any lot or parcel of the property assessed, whether acquired prior or subsequent to the date of the taking effect of the ordinance, may pay his share separately.

Divided Interest, Benefits, How Divided—Procedure—Death of Owner Pending Proceedings—Modes of Collecting Assessments—Money Collected, How Used.

In the case of divided interest the benefits shall be divided in proportion to the area of the lot or tract assessed. No sale on execution on any tax bill shall be affected or invalidated because there may have been ground to set aside or reduce the tax bill. * * *

Sec. 6. Appeal to Circuit Court.

In case the city, or any person affected by the proceedings, either as the owner thereof or interested in any of the property taken or damaged, or as the owner of, or interested in any of the property assessed, shall feel aggrieved by the verdict of the jury, such party so aggrieved may, within twenty days from the time the verdict of the jury is confirmed, appeal to the Circuit Court of Jackson County, Missouri, at Kansas City. If an appeal is taken, the same shall be perfected by the filing with the Clerk of the Municipal Court within the time aforesaid, by some party in interest as aforesaid, such an affidavit as is required by law in appealing from the judgment of a Justice of the Peace, and in which affidavit the party appealing, or his agent, shall state what interest the party appealing has in the proceedings. The party appealing may, however, discontinue such appeal at any time before the transcript has been filed in the office of the Clerk of the said court, by filing a statement in writing to that effect with the Clerk of said Municipal Court.

How Perfected—Duty of Clerk on Appeal—Transcript—Tried De Novo—New Parties—When Triable—Verdict to Conform to What—Assessments, When Paid—Lien—Not Paid—Execution, Shall Show What—Sale and Deed—Force and Effect of—City May Purchase.

If an appeal is so taken it shall be the duty of the clerk of the Municipal Court within sixty days from the taking of such an appeal, unless the appeal be so discontinued, to certify and file with the Clerk of the Circuit Court of Jackson County, at Kansas City, a transcript of the proceedings and all papers filed and used in the trial, or a copy thereof, except the verdict of the jury, but the certificate to said transcript shall state that a verdict was rendered in the proceeding from which the appeal is taken; and thereupon the said Circuit Court shall become possessed of the cause, and said cause, unless dismissed, shall be tried *de novo* in said Circuit Court and have precedence over all other causes for trial; and if necessary to a final determination of any question arising in said cause, the Circuit Court shall have the power to make and bring in other parties to such proceedings on service of notice upon them to be made in the manner required by section two of this Article; and if such appeal is taken preceding any term of said court it shall stand for trial at such term; and if such appeal is taken during the sitting of said court, the cause shall be immediately docketed upon the filing of the transcript and stand for trial, but for good cause, in the discretion of the court, any such proceeding may be postponed or continued, and such proceedings shall not be affected by any postponement or continuance, or want thereof. Such trials on appeal are to be conducted in all respects and subject to the same rules and the same laws as other trials had in the Circuit Court as fully as may be and the same record thereof made and kept. The verdict of the jury or finding of the court, sitting as a jury, shall conform in all respects to the requirements of section three of this Article, and shall have the same force and effect as therein specified, and provided for verdicts of the jury in the Municipal Court, and shall be binding and conclusive upon all persons and parties concerned or interested in the proceedings, and no confirmation thereof by the Common Council shall be required. The assessments against private property shall be paid within the same time, and until paid bear the same rate of interest as provided in section

four of this Article, and the amounts assessed against private property by the finding or verdict shall stand as a judgment, and be a lien on the several parcels of property charged, from the date the ordinance for the improvement takes effect, until paid, and if such assessments are not paid within sixty days from the judgment of the court on the finding or verdict, special execution or executions, as required, may issue against the several lots or parcels of property against which assessments for benefits are made, and the execution shall be in favor of Kansas City, Missouri, and show the description of the lot or parcel of ground and the amount assessed against the same as shown by the verdict, and show the rate of interest upon assessments, with the date when the same began to accrue, and state that the assessment has been made to pay compensation for private property taken or damaged for the purpose specified in the ordinance providing for the improvement, giving the title and date of approval of the ordinance; which execution shall conform to the proceedings on special executions provided by section four of this Article, and the said proceedings, sale and deed shall have the same force and effect as stated in said section; Provided, however, That the city shall have power to bid in such property at such sales and have and hold the same as any other purchaser.

On Appeal, Jury to Consist of Six Freeholders—To Examine Property—Verdict—Judgment Shall be What—How Collected.

On appeal under this section the jury shall consist of six men who shall be disinterested freeholders of the city and be chosen by the judge of the court. They shall, before making their verdict, examine personally the property taken or damaged and that to be assessed with benefits, and upon the finding or verdict, judgment shall be entered thereon that the city have and hold the property sought to be taken for the purpose specified in the ordinance providing for the improvement, and pay therefor the amount assessed against the city, and full compensation assessed therefor, and that the several lots and parcels of private property assessed to pay compensation by the verdict or finding stand charged, and be bound, respectively, for the payment of assessments, with interest as provided in this Article, and that such judgment be enforced by special execution or executions to collect assessments as aforesaid, without special tax bills, and the

court may, by execution or otherwise, put the city in possession of the property taken, or any part thereof, the full compensation therefor having been paid to the owner or party damaged, or into court for him.

Costs, How Taxed.

The court shall tax and charge the costs in appeals according to equity.

Sec. 7. Appeal—Circuit Court—Dismissal—Interest On Judgment From Date of Dismissal—Appeal From Circuit Court—Bond For Costs—Interest On Judgment.

When any proceeding is appealed to the Circuit Court and none of the appellants appear at the time of said hearing of said proceeding, the court shall dismiss the appeal; and any party appealing may, at any time before the jury has rendered a verdict, dismiss his appeal to the Circuit Court; and should the party appealing not appear, and his appeal be dismissed, or when all parties who may have appealed shall have dismissed their appeals, the verdict rendered on the hearing before the Municipal Court shall remain in full force and be binding on all parties interested in said proceedings, and be enforced as if no appeal had been taken. In case of such dismissal of the appeal or appeals to the Circuit Court, the several amounts assessed against the property deemed benefited shall bear interest as hereinbefore provided only from date of the dismissal of such appeal or appeals. Any party or parties may appeal from the judgment of the Circuit Court in such manner as appeals are taken in other civil causes, but the only bond required of the party appealing shall be one, conditioned that should the judgment of the Circuit Court be affirmed by the Appellate Court, or should such appeal be dismissed, he will pay all costs of such appeal. When an appeal shall be taken from the Circuit Court, the amounts assessed upon the property deemed benefited shall bear interest only from the affirmance of the judgment in the Appellate Court, or from the dismissal of the appeal or appeals; Provided, however, That if the party or parties appealing shall be the owner or owners of the property assessed with benefits, then such party or parties appealing shall, unless the judgment be reversed in the Appellate Court, pay interest at the rate of eight per cent per annum on the amount or amounts of the judgment in the Circuit Court charged from date judgment is rendered until paid.

Sec. 23. Defective Proceedings—Supplemental.

When by reason of any error, defect, or omission in any proceedings, or in the verdict or judgment therein that may be instituted under the provisions of this Article, a portion of the private property sought to be taken, or some interest therein, cannot be acquired, or an assessment is made against private property which cannot be enforced or collected, or when, by reason of any such defect, private property in the benefit district is omitted, the city may, by ordinance, institute, carry on and maintain supplemental proceedings to acquire the right and title to such property or interest therein intended to be taken by the first proceeding, but which cannot on account of such defect, error or omission, be acquired thereunder, or to properly assess against any piece or parcel of private property against which an assessment was in the first proceeding erroneously made or omitted to be made, the proper amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement to be determined by the verdict of the jury in such supplemental proceedings; and the original assessments may be revived, corrected, increased or diminished as may be necessary or equitable under the provisions of this Article for the original proceedings. Such supplemental proceedings shall be instituted and conducted as to the particular piece or pieces of private property sought to be acquired or assessed in like manner and with like effect as in the original proceedings, and shall be known and described as supplemental proceedings for the purposes specified in the original ordinance; and a supplemental verdict and assessment shall be made, confirmed and copies of the original verdict certified in every particular as in the original proceedings; and the assessments as established and corrected by such supplemental verdict shall be collected by the City Treasurer in the same manner and under like conditions and restrictions, powers and duties as in the case of original proceedings.

Supreme Court, U. S.
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No. 261.

In the

Supreme Court of the United States

October Term, 1915.

ST. LOUIS AND KANSAS CITY LAND COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, et al., *Plaintiffs in Error.*

vs.

KANSAS CITY, *Defendant in Error.*

STATEMENT OF FACTS, BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

ANDREW F. EVANS,
City Counselor of Kansas City, Mo.
ARTHUR F. SMITH and
JESSE C. PETHERBRIDGE,
Assistant City Counselors of Kansas City, Mo.
Attorneys for Defendant in Error.

I. N. WATSON,
EDWARD J. WHITE,
H. M. LANGWORTHY,
KENNETH MC. DEWEESE,
Attorneys for Plaintiffs in Error.

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In the

Supreme Court of the United States

October Term, 1915.

ST. LOUIS AND KANSAS CITY LAND COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, UNION DEPOT BRIDGE & TERMINAL RAILROAD COMPANY, EDGEWATER TERMINAL RAILWAY COMPANY, MISSOURI PACIFIC RAILWAY COMPANY, FEDERAL INVESTMENT COMPANY, KANSAS CITY, ST. LOUIS & CHICAGO RAILROAD COMPANY, THE CHICAGO & ALTON RAILROAD COMPANY, STATE LINE IMPROVEMENT COMPANY, KANSAS CITY STOCK YARDS COMPANY, AND ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, *Plaintiffs in Error,*

vs.

KANSAS CITY, *Defendant in Error.*

STATEMENT, BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

No. 261.

STATEMENT.

This cause is one growing out of a proceeding by Kansas City, Missouri, to condemn land

for the widening of a public street within its confines, and is here on a writ of error to review the final judgment of the Supreme Court of Missouri, rendered against the plaintiffs in error therein.

Sixth Street (the street sought to be widened) in Kansas City is one of the main thoroughfares, leading from the wholesale district in the West Bottoms in Kansas City to the wholesale and retail district uptown, over which an immense amount of heavy vehicle traffic is carried. The street also connects, at its west end, direct with the Intercity Viaduct, between Kansas City, Missouri, and Kansas City, Kansas, extending over the West Bottoms and across the Kaw River. It is a narrow street, with a roadway of only thirty-six feet, between Broadway and Bluff Streets, and, because of its importance as such main thoroughfare for heavy teaming, and because of the increasingly congested condition thereof, it was deemed wise by the common council of Kansas City to widen the street between the points mentioned. In October, 1909, the city, under its charter powers relating to the condemnation of land for public purposes, enacted an ordinance (No. 3209), to widen the street, between the points mentioned, by condemning a strip of private land forty feet wide for that purpose. The ordinance, as the charter provides, described the land to be condemned and taken in one section, a benefit district was also fixed by the ordinance in another section, upon the lands within which, including the lands of the city, was to be assessed the benefits to pay for the lands

so condemned and taken. A proceeding was then filed in court, and a jury of six freeholders of the city was impaneled to hear the evidence and ascertain the amount of the award to be allowed for the land condemned, taken and damaged. The jury also assessed the benefits against the city, and on the lands in the benefit district, to pay for the land so condemned. It happened in this proceeding that the notice required by the charter in such cases was not sufficiently published. This error was not detected until after the case was heard and more than half of the benefit assessments had been paid. The persons whose property was taken or damaged appeared at the hearing, and a majority of the persons who were assessed with benefits paid their assessments, and thereby ratified the judgment rendered in that proceeding. About $89,317 of the benefits were collected. When the city attempted to collect the assessments made against property of the plaintiffs in error herein they complained that they had had no notice of the proceedings, and that the assessments as to their property, were void. They then procured a permanent injunction, enjoining the city against collecting the assessments made in the original proceedings, in so far as such assessments affected their property at that time. All further collections of the benefits then stopped. There was then left about $76,981.98 to be collected from about 5,000 different tracts of land owned by a large number of property owners. The city then attempted to repeal the ordinance so that it might pay back the assessments so collected and abandon the proceedings; but it was

again permanently enjoined by the property owners whose property had been taken, from repealing the ordinance and taking such action. The city being thus enjoined, both "fore and aft," it could neither go forward nor backward.

In such cases, Sec. 23 of Art. 6 of the Kansas City Charter, relating to condemnation matters of this character, provides that where an assessment is made against private property which cannot be enforced or collected, or when, by reason of any defect, private property in the benefit district is omitted, the city may, by ordinance, institute, carry on and maintain *supplemental* proceedings to properly assess any piece or parcel of private property against which an assessment was in the first proceeding erroneously made, or omitted to be made, the proper amount which such private property is benefited by the proposed improvement, to be determined by the verdict of a jury in such *supplemental* proceedings; and that the original assessments may be revived, corrected, increased or diminished, as may be necessary or equitable.

The city, under that charter provision, in February, 1911, passed a *supplementary ordinance* (No. 7539) and instituted *supplemental proceedings* thereunder, in which a new hearing was had, after proper notice, and all of the tracts of land upon which the assessments were erroneously made, or omitted to be made, in the original proceedings, and which had not been paid, were re-assessed. Due notice was published of such supplemental proceedings, as required by the Kansas City Char-

ter, and all the plaintiffs in error, except one, responded thereto and participated in the trial.

The supplemental proceeding was first had in Kansas City's Municipal Court, as the ordinance provided. From the final confirmation and judgment in that court, certain of the plaintiffs in error here appealed the proceedings to the Circuit Court of Jackson County, Missouri. At the inception of the trial in the Circuit Court, the judge announced that he would try the whole proceeding *de novo*. Certain property owners, whose land had been taken in the *original* proceedings, protested, and asked time to go to the Supreme Court of Missouri and sue out a writ of prohibition, to prevent the court from re-trying the issue as to the *amount* of the damage allowed for the property taken in the original proceeding. That writ was granted. (*State ex rel. Tuller* v. *Seehorn, Judge,* 246 Mo. 568.) At the same time, certain of the plaintiffs in error herein, who are owners of property in the benefit district, also made application to the Supreme Court of Missouri for a writ of prohibition, prohibiting the trial court from trying the case at all, which writ was denied. (*State ex rel. Graham* v. *Seehorn, Judge,* 246 Mo. 541.) Pending the applications for the writs of prohibition, the trial court continued the proceedings. After the decisions in the above cases were rendered, the cause came on for trial, and the court proceeded to try the matter in accordance with the decision of the State Supreme Court in those cases.

The trial, under the supplemental proceedings in the Circuit Court, resulted in all the lands in

the benefit district described, which had been erroneously assessed, or omitted to be assessed, in the first proceeding, and which assessments had not been paid, being re-assessed with the amount of the uncollected assessments, in the proportion that each tract of land was specially benefited by the improvement, including an assessment against the city. None of the property of any of the plaintiffs in error was condemned, taken or damaged in either the original or supplemental proceedings; but their property was assessed in the supplemental proceedings, with various amounts. (Exhibit F, trans. rec. 48-49.)

After the trial was over, and the verdict had been rendered, in the supplemental proceedings, the plaintiff in error, the Bridge Company, appeared for the first time, and filed a motion for a new trial, claiming that its property had been assessed twice.

Counsel for plaintiffs in error are either mistaken about the Bridge Company's lands having been assessed twice, or they are unfortunate in the language used, as it might convey that idea. The land—the same tracts of land—of the Bridge Company was not assessed twice, and there is no evidence in the record of such double assessment. It owned several tracts of lands, or claimed to own them, within the benefit district. It is true that in the first, or original, proceeding a certain tract of its lands was assessed, which assessment it paid. But the other tracts which it afterwards acquired, and which it owned at the time of the trial of the *supplemental* proceedings, was not assessed in the original or first proceeding. The

Supreme Court of Missouri, in its opinion filed in the final judgment in this case, finds, as a matter of fact, that there was no such double assessment. (Trans. rec. pp. 263-4.)

From the judgment rendered in the supplemental proceedings, plaintiffs in error herein appealed to the Supreme Court of Missouri, where the judgment of the trial court was affirmed. (*St. Louis & Kansas City Land Co. et al.* v. *Kansas City*, 260 Mo. 395, copy opinion, Trans. Rec. 252-264.)

From that judgment, plaintiffs in error sued out a writ of error, and have lodged this cause here for final review, claiming that their property has been taken without due process of law in violation of the Fourteenth Amendment to the Federal Constitution; the defendant in error, Kansas City, contending that it has not.

The Question Involved.

The plaintiffs in error contend that they were necessary parties in the *original* proceedings, in which the jury fixed the amount of the award to be paid to other persons whose property was taken or damaged, and that the assessing of their property with benefits to pay for same, without giving them an opportunity of being heard upon the amount of the award in the original proceedings, was taking their property without due process of law, and therefore void.

The defendant in error contends that the plaintiffs in error were *not necessary* parties to the condemnation branch of the proceedings, and were

not entitled to notice thereof, as a matter of law, and since they had notice of and a full opportunity to be heard and were heard in the supplemental proceeding when their lands were assessed, that due process of law has been observed as to them and no right of theirs was violated under the Federal Constitution; and that while the Charter of Kansas City provides, for the sake of convenience, for a single hearing in which the amount of the award for the land taken is fixed, and the benefits to pay for such land are assessed, yet the Charter could very properly have provided for entirely separate proceedings—one for the condemnation of land and fixing the amount of the award therefor, and the other for assessing the benefits, as is the case under the St. Louis Charter; and that since the Supreme Court of Missouri has held in this case that the Charter of Kansas City is to be construed as though it had, in express terms, provided for the separation of the condemnation part of the proceeding from the assessment part thereof, so far as the joinder of the parties is concerned; and that as this court has held on several occasions that the condemnation proceeding may be conducted independently of the assessment proceeding, no right of the plaintiffs in error, conferred by the Federal Constitution, has been invaded.

Motion to Dismiss Writ of Error.

A motion to dismiss the writ of error, because no Federal question is involved or presented by the record, and a motion to affirm the judgment

of the Supreme Court of Missouri, because the writ was sued out for delay only, and the questions on which the decision of this case depends, are so frivolous as not to need further argument, have heretofore been filed herein by the defendant in error. These motions were, as the rule requires, submitted upon briefs of both sides; upon being reached by this court for disposition, we understand, the court ordered that the consideration thereof be passed to such time as this cause was reached for argument upon its merits, when they would be considered along with the briefs and arguments upon the merits. We now call the court's attention to such motions and our brief in support thereof, and ask consideration of the same, and again insist that there is no Federal question involved in this case, and that the writ should be dismissed; and if that ought not to be done, then that the judgment of the Supreme Court of Missouri be affirmed, for the reasons in said motion stated, under paragraph 5 of Rule 6 of this court relating to such matters.

POINTS AND AUTHORITIES.

Due Process of Law Has Been Observed in This Case.

(a) The assessment of benefits to pay for land taken in the widening of a public street is the exercise of the taxing power of a municipality, as distinguished from the exercise of its power of eminent domain, and, therefore is not taking private property without due process of law, if notice of the time and place of the proposed assessment is given, as was done in this case, and plaintiffs in error were not denied the equal protection of the law in violation of the Fourteenth Amendment of the Federal Constitution.

Goodrich v. *Detroit*, 184 U. S. 432, l. c. 437 and following;
Voigt v. *Detroit*, 184 U. S. 115, l. c. 122.
Spencer v. *Merchant*, 125 U. S. 345;
Lombard v. *Chicago Park Com'rs*, 181 U. S. 33.
Londoner v. *Denver*, 210 U. S. 373, l. c. 378;
Willoughby et al. v. *Chicago*, 235 U. S. 45;
State ex rel. Tuller v. *Seehorn*, Judge, 246 Mo. 568, l. c. 583;
Kansas City v. *St. Louis & K. C. Land Co. et al.*, 260 Mo. 395 (Copy opinion, Trans. Rec. 252-264);
Kansas City v. *Ward*, 134 Mo. 172, l. c. 179;
St. Louis v. *Ranken*, 96 Mo. 497, l. c. 507.

(b) The plaintiffs in error not being the owners of any of the property taken in the original proceeding, were not *necessary* parties thereto, and were not entitled to notice of such original proceedings.

Goodrich v. *Detroit*, 184 U. S. 432;
Voigt v. *Detroit*, 184 U. S. 115, l. c. 120.
Weyerhaueser v. *Minnesota*, 176 U. S. 550;
Spencer v. *Merchant*, 125 U. S. 345;
1 Page & Jones on Taxation by Assessment, p. 213;
State ex rel. Tuller v. *Seehorn*, Judge, 246 Mo. 568, l. c. 583;
Kansas City v. *St. Louis & Kansas City Land Co.*, 260 Mo. 395 (Copy of opinion contained in Trans. Rec. 252-264);
St. Louis v. *Ranken*, 96 Mo. 497, l. c. 507;
St. Louis v. *Brinckwirth*, 204 Mo. 280, l. c. 303;
St. Louis v. *Calhoun*, 222 Mo. 44, l. c. 53-54;
Kansas City v. *Ward*, 134 Mo. 172, l. c. 179-180.

(c) The construction placed on a statute of a state, or on an ordinance or charter provision of a city in such state, by the highest judicial tribunal of that state, will be followed by this court.

King v. *Portland City*, 184 U. S. 61;
Baltimore Traction Co. v. *Baltimore R'y Co.*, 151 U. S. 137;
Long Island Water Supply Co. v. *Brooklyn*, 166 U. S. 685;
Louisville R'y Co. v. *Mississippi*, 133 U. S. 587-90;

Merchants & Manufacturers Bank v. *Pennsylvania,* 167 U. S. 461;
Frank J. Willoughby et al. v. *Chicago,* 235 U. S. 45;
Minnesota Iron Co. v. *Kline,* 199 U. S. 593.

(d) Plaintiffs in error have had their day in court upon the only issue in which they have an interest.

(e) Proceedings under Sec. 23, Art. 6, of the Kansas City Charter were valid.

State ex rel. Tuller v. *Sechorn,* Judge, 246 Mo. 568, l. c. 583;
Kansas City v. *St. Louis & K. C. Land Co.,* 260 Mo. 395.

(f) Supplemental ordinance construed and upheld.

(g) Two proceedings in condemnation cases are constitutional—one to fix the awards, and one to assess the benefits.

See authorities cited under "a," *supra.*

(h) A decision by the State Supreme Court that the formalities of the state or municipal taxing laws have been observed, presents no Federal question where the contention is that the manner of their observance was a denial of due process of law.

French v. *Taylor,* 199 U. S. 274;
Corry v. *Campbell,* 154 U. S. 629.

(i) The original proceedings were valid as to those who abided the judgment.

State ex rel. Tuller v. *Seehorn,* Judge, 246 Mo. 568, l. c. 580.

(j) The judgment in the Union Pacific injunction case affected only the rights of plaintiffs in error as to *their* assessments in the original proceeding.

Kansas City v. *St. Louis & K. C. Land Co.,* 260 Mo. 395, l. c. 414-415.

(k) The rights of the property owners in the benefit district were not cut off.

(l) The provisions of the charter of Kansas City, Missouri, are regarded as having the same force as a legislative enactment; and ordinances passed in pursuance thereof are binding.

Morrow v. *Kansas City,* 186 Mo., l. c. 683;
McGhee v. *Walsh,* 249 Mo. 266, l. c. 281;
Ex parte Robert C. Smith, 231 Mo. 111, l. c. 122-123.

(m) The charter of Kansas City is a public act of which the courts take judicial notice.

Kansas City v. *Smart,* 128 Mo. 272, l. c. 298;
Sec. 16, Art. IX, Missouri Constitution.

(n) The lands of the Bridge Company were not assessed twice.

BRIEF AND ARGUMENT.

Due Process of Law Has Been Observed.

If the provisions of the Kansas City charter relating to the assessments of benefits in condemnation matters and the supplemental ordinance under consideration, make ample provision for notice to the owners of property in the benefit district of the time when the proposed assessment is to be made against their property and an opportunity is afforded them to be heard thereon, and if in this proceeding such notice was given and opportunity afforded the plaintiffs in error, then no right of theirs was violated and due process of law has been duly observed within the meaning of the Federal Constitution. The record in this case shows such provisions were made and such conditions were met.

(a) Plaintiffs in error, in suing out the writ of error and causing this case to be lodged in this court for final review, manifestly have confused the exercise by the city of its power of taxation with the exercise of its power of eminent domain. The exercise of the one power does not necessarily involve the exercise of the other; nor are they so related to each other that they have to be exercised at the same time and in the same proceeding. They are separate and distinct powers, governed by entirely different rules of procedure and controlled by different principles of law.

The city in the exercise of its power of eminent domain, in the *original* proceedings, condemned lands for the purpose of widening a public street within its confines. In the *supplemental* proceedings the city exercised its power of taxation to raise a part of the money to pay for the lands so taken in the first, or original, proceedings. None of the lands of the plaintiffs in error was taken in the original or supplemental proceedings; but in the supplemental proceedings (of which they had legal notice and responded) their lands were assessed with certain benefits to pay, in part, for the lands already taken in the first proceeding. They complain because they were not given an opportunity to contest the *amount* of the award allowed for the land so taken, in the first proceeding.

We contend they were not entitled to make such contest, and that in denying them such opportunity no right, privilege or immunity of theirs under the Federal Constitution was violated, and they were not denied due process of law in violation of the Fourteenth Amendment of the United States Constitution.

The Supreme Court of Missouri has held that the only necessary parties to the first, or original, condemnation proceedings were the city and the parties whose lands the city was seeking to take. Those parties were in court in the original proceeding and now abide the judgment therein rendered. While the Kansas City charter provides that the power of eminent domain and the power of taxation may be exercised in one proceeding, that method was adopted to procure a more con-

venient and speedy method of procedure, and not because of any requirement of the Federal Constitution that both powers shall be exercised in one proceeding. The powers could as well have been exercised in separate proceedings, and the charter could have so provided, as is the case with the St. Louis charter (*St. Louis* v. *Ranken*, 96 Mo. 497, 507; *St. Louis* v. *Brinckwirth*, 204 Mo. 280, 303); and the Kansas City charter does so provide, in effect, in the section authorizing supplemental proceedings, whenever such proceedings become necessary, as was the case here. The decision of the Supreme Court of Missouri that the provisions of the Kansas City charter do not require that the persons whose property is being assessed to pay the cost of the property taken in the condemnation branch of the proceeding, be made parties in that proceeding, and that they are not necessary parties to that branch of the case (*Tuller* v. *Sechorn, Judge*, 246 Mo. 568, l. c. 583; *Kansas City* v. *St. Louis, etc., Co.*, 260 Mo. 395), is a construction of a local statute; and as that charter provision and the construction of it by the Missouri Supreme Court together establish a form of procedure which is not in violation of any provision of the Federal Constitution, there is no Federal question presented in this case. (*Missouri* v. *Dockery*, 191 U. S. 165, 170, 171; *Willoughby* v. *Chicago*, 235 U. S. 45.)

The point presented by the plaintiffs in error that they were entitled to contest the amount of the award in the condemnation branch of the proceeding (they not being interested in the land taken), has been decided by this Court so many

times against them that the question is no longer an open one, as we view it.

The case of *Goodrich* v. *Detroit*, 184 U. S. 432, was a condemnation proceeding quite similar to the case at bar, in which the lands were taken in one branch of the proceedings and the benefits to pay for such lands were assessed in another. Goodrich was not notified of the first proceeding, nor was he present to contest the amount of the award, but in the second proceeding to assess the benefits, he was given an opportunity to contest the amount of the assessment against his land. He contended, however, that the owners of the property liable to be assessed for the benefits were just as much interested in the proceedings as to the necessity for making the improvements and the *amount* of the compensation to be paid therefor, as were the owners of the land to be taken for such improvement, and that the same reasons for notice apply in the one case as in the other. This Court, speaking through Mr. Justice Brown upon this point, denied such contention, and in doing so, on page 437, said:

> "The law in this Court is too well settled to be now disturbed, that the interest of neighboring property owners, who may possibly thereafter be assessed for the benefit to their property accruing from opening a street, is too remote and indeterminate to require notice to them of the taking of lands for such improvement, in which they have no direct interest. The position of the plaintiffs in this particular would require a readjustment of the entire proceedings, and a determination of the

property incidentally benefited, before any proceedings are taken for the condemnation of land directly taken or damaged by such improvement. It might be argued upon the same lines that, whenever the city contemplated a public improvement of any description, personal notice should be given to the taxpayers, since all such are interested in such improvements and are liable to have their taxes increased thereby. It might easily happen that a whole district or ward of a particular city would be incidentally benefited by a proposed improvement, as, for instance, a public school, yet to require personal notice to be given to all the taxpayers of such ward would be an intolerable burden. Hence it has been held by this Court that it is only those whose property is proposed to be *taken* for a public improvement that due process of law requires shall have prior notice.

"Thus in *Spencer* v. *Merchant*, 125 U. S. 345, it was held that, if a state legislature direct the expense of laying out a street to be assessed upon the owners of lands benefited thereby, and also determine the whole amount of the tax and what lands are, in fact, benefited, and provides for notice to and hearing of each owner, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of property without due process of law. Said Mr. Justice Gray (p. 356): 'But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited, and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are to be benefited or not, but only upon the

validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited.' So, in *Parsons* v. *District of Columbia*, 170 U. S. 45, it was held that an enactment by Congress that taxes levied for laying water mains in the District of Columbia, should be at a certain rate per front foot against all lots or lands abutting upon the street in which the main should be laid, was conclusive alike of the necessity of the work and of its benefits to all abutting property. So, also, it was said in *Williams* v. *Eggleston*, 170 U. S. 304, 311: 'Nor can it be doubted that if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited.' Cooley on Taxation, 2d Ed., p. 149.

"This question, however, is decided in the case of *Voigt* v. *Detroit City*, *ante*, p. 115, recently disposed of, and will not be further considered here. Indeed, so far as this question is concerned, this case might be affirmed upon the authority of that."

The Voigt case above mentioned was also a condemnation proceeding like the Goodrich case. This Court, after stating the facts and the decision of the state Supreme Court thereon, upon this point, at page 122, said:

"The law, then, as we understand the decision of the Supreme Court of the state, provides for the formation of a district in the vicinity of the proposed improvement, the limits of the district to be determined by the benefits derived from that improvement, and further provides that the common council shall determine what proportion of the cost of the improvement ('compensation awarded by the jury') shall be assessed upon the owners of the real estate benefited. The language of the statute is: 'The amount of the benefit thus ascertained shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may be, to the advantage which such lot, parcel or subdivision is deemed to acquire by the improvement.'

"It would be difficult to find any provision fairer than this in purpose and which so essentially satisfies every requirement of due process of law. And such purpose cannot be defeated if a hearing to the property owner can prevent defeat. He is given a thoroughly efficient opportunity to be heard to test the legality of the charge upon him. And it is only with the charge upon him that he is concerned, and of that alone can he complain. In the legality of that charge is necessarily involved the legality of all which precedes it and of which it is the consequence. The Supreme Court of the state decided, as we have seen, 'that the amount of the taxes which may be assessed upon the district or upon any given parcel of land cannot exceed the benefits.' On the hearing given, therefore, the property owner can show a violation of the rule, if a violation there be. and the showing will take his land out of the district and relieve it from the tax.

"The contentions of plaintiff in error seem to be based on the assumption that a property owner must have notice of every step of the proceedings. Such assumption is untenable. *Weyerhaeuser* v. *Minnesota*, 176 U. S. 550, and cases cited; *King* v. *City of Portland*, *ante*, 61. Judgment affirmed."

Lombard v. *West Chicago Park Commissioners*, 181 U. S. 33, is a case with a history quite like that of the case at bar. There was in that case an invalid assessment for the making of a public improvement, and subsequently a new assessment was made, by virtue of law passed after the improvement had been completed. On the second hearing there was a finding of the amount of benefits resulting from such improvement. It was claimed by an owner of property assessed in the second proceeding that such action was taking his property without due process of law, and therefore a violation of the Fourteenth Amendment to the Federal Constitution. On writ of error reviewing the decision of the Illinois Supreme Court, upholding the assessment, this Court said:

"The power of the State of Illinois to levy a special assessment in proportion to benefits, for the execution of a local work, and the authority to confer on a municipality the attribute of providing for such an assessment, is not denied.

"It is no longer open to question that where a special assessment to pay for a particular work has been held to be illegal, no violation of the Constitution of the United States arises from a subsequent authority given to

make a new special assessment to pay for the completed work. *Spencer* v. *Merchant,* 125 U. S. 345."

In the case of *Londoner* v. *Denver,* 210 U. S. 373, l. c. 378, where the same contentions were made as here, this Court, following the doctrine laid down in the Goodrich and Voigt cases, *supra,* concerning the question of whether the land owner in the taxing district was entitled to notice and a hearing upon the necessity for the improvement and the cost thereof in the first instance, held that he was not, and that such denial was not depriving him of his property without due process of law. This Court, upon that branch of the case, at page 378, said:

> "The state Supreme Court held that the determination of the city council was conclusive that a proper petition was filed, and that decision must be accepted by us as the law of the state. The only question for this court is whether the charter provision authorizing such a finding, without notice to the land owners, denies to them due process of law. We think it does not. The proceedings, from the beginning up to and including the passage of the ordinance authorizing the work, did not include any assessment or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done without hearing to the landowners, provided a hearing upon the assessment itself is afforded. *Voigt* v. *Detroit,* 184 U. S. 115; *Goodrich* v. *Detroit,* 184 U. S. 432."

The Londoner case, however, turned on another point. It seems that when the second branch of the proceedings were reached and the time came for the assessments to be taxed against the property to pay for the improvement originally ordered and provided for, no notice of the time and place of a hearing was given, and no hearing was had, as required by the charter of Denver, in such cases made and provided. For that reason the judgment of the Supreme Court of Colorado was reversed.

A hearing was afforded the plaintiffs in error in the case at bar upon the assessments sought to be made upon their lands in the supplemental proceedings, which they took advantage of and contested in every way known to skilled and trained lawyers.

In the very recent case of *Willoughby* v. *Chicago*, 235 U. S. 45, this Court holds to the rule contended for by defendant in error. That case upon the facts was, in many respects, like the case at bar. It seems that in 1893 certain lands in Chicago were condemned for a public street, and afterwards lands in the benefit district were assessed with assessments to pay for these betterments, including the lot in question. A trial was had in regard to these matters, and upon an appeal to the Supreme Court of Illinois it held that the part of the lots under consideration could be assessed with benefit assessments. However, there was a failure to send the mandate down within the two years as provided by the statute, and the assessment upon those lots failed. In January, 1910 (seventeen years afterwards), the city

passed an ordinance for a new or supplementary assessment, the object of which was to reach these lots, and a new petition was filed and a hearing had thereon, in which the supplementary assessments were upheld. The second proceeding was appealed to the Supreme Court of Illinois and affirmed. From the final decision of the Supreme Court of Illinois in the last case, the plaintiffs in error sued out a writ of error and the case was brought here, the plaintiffs in error claiming that their property was taken without due process of law and in violation of the Fourteenth Amendment to the United States Constitution. A motion was made there, as here, to dismiss the writ, on the ground that no Federal question was involved. This Court sustained the motion, holding that it had no jurisdiction of the matter. This Court, speaking through Mr. Justice Holmes, on the point contended for by the City here at page 49, said:

> "There is a motion to dismiss, upon which we must dispose of the case. The objection which is urged is that there was no statutory authority for this proceeding, and that the assessment was imposed by mere judicial fiat that could not have been anticipated, and that was without warrant of law. If there were anything in this objection, it was obvious from the beginning; and as it was not taken at the trial it was not open in the Supreme Court of the state and could not be considered here. * * * It is obvious, too, that the state could have authorized the proceeding followed here, which ordinarily is the only question to be considered by this court. *Missouri* v. *Dockery,* 191 U. S. 165.

> "If the assessment could have been levied against the original owners of the land, purchasers took subject to the same liability. *Seattle* v. *Kelleher*, 195 U. S. 351. The question whether it could have been levied if the land had not been sold depended upon the construction of state statutes, as to which we follow the decision of the state court."

The Supreme Court of the State of Missouri has held a number of times that the land owner in the taxing or benefit district is not interested in the land appropriated nor in the improvement to the extent that he is entitled to notice and a hearing at the time the land is taken. Upon this point, in *Kansas* v. *Ward*, 134 Mo., l. c. 179, in a condemnation case arising under the Kansas City charter, the court said:

> "If the proposition contained in this *dictum*, that special benefits can be assessed against real estate only when the owner has or retains some property interest in the land taken for a public improvement, be correct, then the appellant's contention can be maintained, and benefit districts of the establishment or improvement of public streets must hereafter be confined to the abutting property thereof.
>
> "But to maintain such a doctrine would be to place an unwarranted limitation, unsupported by reason or justice, upon the principle upon which assessments for special benefits are upheld. The right to make such assessments being an exercise of the *taxing power;* and the foundation of the right, the benefit which the property assessed is sup-

posed to receive from the expenditure of money, and having no necessary connection with the right of eminent domain or the property acquired for public use by the exercise of that power, or otherwise, the right to tax the property benefited by a public improvement of any character cannot in the nature of things be dependent upon a property interest in the improvement, and we have failed to find a reported case in which it is so adjudged.

"The right to tax the owner's property is not because he has a property interest in the improvement, or in the land appropriated therefor, but because his property is benefited by the improvement to pay for which he is taxed, and for that reason only does the right exist and the power to exercise it; and it applies to his property benefited by a public park just as well as to his property benefited by a public street; as well to his property benefited by a public street in which he has no property interest, as by one on which his property abuts—and so it has been uniformly applied.

"It follows that the provisions in this article of the charter, by which the special benefit to the property in proximity to the park, over and above the benefits to be derived therefrom by the city generally, is to be charged against the property thus benefited, is not obnoxious to the constitutional provision which forbids the taking of private property for public use without just compensation, and this point must be ruled against the appellants."

And, again, the Supreme Court of Missouri, in *The City of St. Louis* v. *Ranken*, 96 Mo. l. c. 500

and 507, in a condemnation proceeding, speaking upon this point, said:

> "It is also as well settled that the power of the government by which such contribution is enforced, is the exercising of the taxing power of the government and not of the power of eminent domain. Such special benefit is a tax assessed against the particular property benefited." * * * And, "It is not necessary that he (the property owner in the benefit district) should be made a party defendant by petition and summons in the condemnation proceedings. It is sufficient if he is made a party defendant to the tax-assessing branch of the proceedings, by the appropriate and characteristic notice usually given to the taxpayer, provided for in the charter and ordinances, and an assessment made in strict conformity to their requirements, is a valid assessment."

In the late case of *State ex rel. Tuller* v. *Seehorn, Judge*, 246 Mo. 568, l. c. 583, this being one of the cases growing out of *this* proceeding in which a writ of prohibition by the Supreme Court of Missouri was granted, upon this point it was then said:

> "It is also urged that the charter contemplates 'that the property owners in the benefit district shall have their day in court on the question of the *amount* of the allowance to be made for the property taken and damaged.' It is plausibly argued in support of the foregoing that as the property owners of the benefit district and the city must pay the damages awarded for property taken, they

should have their day in court as to the amount of damages for which their property shall become charged.

"In the exercise of the right of eminent domain in the taking of private property, as in the case in hand, the necessary parties are the city as plaintiff, on the one side, and the property owner as the defendant, on the other. And while it would be entirely proper as a matter of grace to permit the owner of property in the proposed benefit district to aid the city in preventing an unduly high valuation of the property condemned, *yet such owner would have no standing in court as a necessary party.* (*St. Louis* v. *Ranken*, 96 Mo. 497; *St. Louis* v. *Brinckwirth*, 204 Mo. 280; *St. Louis* v. *Calhoun*, 222 Mo. 44; *Pleadwell et al.* v. *Glass Co.*, 151 Mo. App. 51; *Kansas City* v. *Smart*, 128 Mo. 272; 1 Page & Jones on Taxation by Assessment, 213; *Goodrich* v. *Detroit*, 184 U. S. 432.)

"In the case of *Kansas City* v. *Smart*, *supra*, a proceeding under charter provisions similar to those involved in this case, in answer to questions raised by owners of property in the benefit district as to a denial of the rights of owners of property to be taken, this court, l. c. 292, said: 'No person is interested in the *compensation* to be awarded these incorporated companies, except the city and the companies.'"

The case of *Weyerhaeuser* v. *Minnesota*, 176 U. S. 550, is an interesting tax assessment case, in which the plaintiff in error contended that his property had been revalued and reassessed for prior years under a special law of the State of Minnesota without any notice to him of such re-

valuation or re-assessment, and that in so doing he was deprived of his property without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States. In the agreed statement of facts in that case the following facts, among others, were agreed to:

> "That no notice of any of said proceedings by any of said persons in making said re-assessment or re-valuation of said lands or in extending said taxes against said lands was ever given by publication or otherwise to these defendants."

Notwithstanding the fact as agreed to, this Court held, following the Supreme Court of Minnesota in construing the statute under consideration, that under the law he did have notice to appear and protest.

This Court further held that the proceedings did not violate the Fourteenth Amendment to the Constitution of the United States and did not deprive the owner of his land so re-assessed of due process of law, and the judgment of the Supreme Court of Minnesota was affirmed.

Necessary Parties to Condemnation Proceedings.

(b) *The plaintiffs in error were not entitled to notice of the original proceedings because they were not necessary parties thereto.*

This doctrine is fully sustained in *Goodrich* v. *Detroit*, 184 U. S. 432; *Voigt* v. *Detroit*, 184 U.

S. 115, l. c. 126; *Spencer* v. *Merchant,* 125 U. S. 345, heretofore discussed in this brief.

In the case of *State ex rel. Tuller* v. *Seehorn, Judge, supra,* this point was squarely presented to the Supreme Court of Missouri, and that court in passing upon this question, at page 583, said:

> "In the exercise of the right of eminent domain in the taking of private property, as in the case in hand, the necessary parties are the city as plaintiff, on the one side, and the property owner as the defendant, on the other. And while it would be entirely proper as a matter of grace to permit the owner of property in the proposed benefit district to aid the city in preventing an unduly high valuation of the property condemned, *yet such owner would have no standing in court as a necessary party.*"

The Supreme Court of Missouri in that case, further commenting upon this point, quoting from *Kansas City* v. *Smart, supra,* said:

> "'No person is interested in the *compensation* to be awarded these incorporated companies, except the city and the companies.'"

And, in *St. Louis* v. *Ranken,* 96 Mo. 497, where a similar question was up and the same contentions were made, as here, that the plaintiffs in error were entitled to notice of the condemnation feature of the proceedings, the court, at page 507, said:

> "It is not necessary that he should be made a party defendant by petition and summons

> in the condemnation proceedings. It is sufficient if he is made a party defendant to the tax-assessing branch of the proceeding, by the appropriate and characteristic notice usually given to the taxpayer, provided for in the charter and ordinances, and an assessment made in strict conformity to their requirements is a valid assessment."

So, in the case at bar, while the plaintiffs in error were not parties to the condemnation branch of the proceedings, and were not necessary parties thereto, yet they were made parties to the tax-assessing branch of the proceedings so far as it affected their lands in the supplemental proceedings, and to which they responded and contested the amount proposed to be assessed against their lands for the public improvement.

The case of *St. Louis* v. *Brinckwirth*, 204 Mo. 280, l. c. 303, was one where the same question was presented in a condemnation proceeding, and the court in that case, upon this point, said:

> "In the case at bar defendants claim that the proceeding is void for two reasons: First, they say that they were not parties to the condemnation suit, and for that reason the entire proceeding is void. This contention is not good. None of their property was to be taken or in fact was taken. Their property simply abutted on one of the alleys to be established. Had the alleys required the appropriation of any part of their land, then they shoud have been made parties to the condemnation branch of the proceeding. Otherwise, they did not have to have notice of this suit. (*City of St. Louis* v. *Ranken*, 96 Mo. 497.)"

And, again, in *St. Louis* v. *Calhoun*, 222 Mo. 44, l. c. 53, 54, the Supreme Court of Missouri, in a condemnation proceeding, speaking upon this point, reiterated the same doctrine, and said:

> "Another contention is that certain property owners whose lands were not to be taken, but against whom benefits were to be assessed, were not brought into the Circuit Court by summons and for this reason the proceeding is void.
>
> "This question was fully determined some years ago in the case of the *City of St. Louis* v. *Ranken*, 96 Mo. l. c. 507. In that case a party against whom benefits were assessed urged that he should have been made a party to the condemnation suit by summons from the Circuit Court, and that a mere notice from the city counselor for him to appear at the time and place fixed for the assessment of benefits was insufficient. In that case we then said: 'It is not necessary that he should be made a party defendant by petition and summons in the condemnation proceedings. It is sufficient if he is made a party defendant to the tax-assessing branch of the proceedings, by the appropriate and characteristic notice usually given to the taxpayer, provided for in the charter and ordinances, and an assessment made in strict conformity to their requirements is a valid assessment.'"

The court then quotes from the case of *St. Louis* v. *Brinckwirth*, *supra*, in which it said:

> "We disposed of the same question in this language:
>
> "'In the case at bar defendants claim that the proceeding is void for two reasons: First,

> they say that they were not parties to the condemnation suit, and for that reason the entire proceeding is void. This contention is not good. None of their property was to be taken or was in fact taken. Their property simply abutted on one of the alleys to be established. Had the alleys required the appropriation of any part of their land, then they should have been made parties to the condemnation branch of the proceeding. Otherwise, they did not have to have notice of this suit. (*City of St. Louis* v. *Ranken*, 96 Mo. 497.)'"

In 1 Page & Jones on Taxation by Assessment, at page 213, Sec. 125, the doctrine enunciated in the foregoing cases on this point is summed up as follows:

> "Notice of every step in assessment proceedings is by no means necessary. On the one hand it is not necessary that notice be given of preliminary matters, which lead up to the determination of the amount for which each tract of property is to be assessed, but do not directly involve such determination. 'If the law provides for the required notice to the land owner whose land it is proposed to charge with any part of the costs of the public improvement, an assessment against his property made under it will not be defeated if he has been given at some stage of the proceedings a fair opportunity to be heard to test the legality, justice and correctness of the assessment. It is only with the charge upon him that he is concerned, and of that alone he can complain. In the legality of that charge is necessarily involved all that precedes it, and of which it is the conse-

quence. When the land owner has been given a hearing at which he might insist that his property was not benefited to the amount assessed, or that it was not benefited at all, and thus obtains every advantage which he might obtain were he informed of every step in the proceedings, there is no want of due process of law within the meaning of the Fourteenth Amendment. * * * So notice need not be given of the condemnation of realty to those whose lands are not to be taken, but are to be assessed for the cost of the improvement."

Thus it is seen that all the decisions, both state and Federal, and the text writers, are in perfect harmony on the doctrine contended for by the City, that parties whose lands are not taken in a condemnation proceeding but who only possess lands in the taxing district, are *not necessary* parties to the condemnation branch of the proceeding, and are not entitled to notice and to a hearing upon that feature of the case; but when it comes to the taxing branch of the proceedings where their property will be assessed or taxed for the payment of land condemned and taken in the other branch of the case, or proceedings, then they are entitled to notice and to a hearing. And if, as in this case, in the supplemental proceedings, notice was given and an opportunity afforded the plaintiffs in error to contest the amount of the tax which was about to be placed upon their lands for the public improvement, then, we submit, due process of law has been observed as required by the Federal Constitution and the State Constitution of Missouri.

Construction of Kansas City Charter and Ordinances by State Court to be Followed.

(c) *The provisions of the Kansas City charter and supplemental Ordinance No. 7539, passed in pursuance thereof, having been construed and upheld by the Supreme Court of Missouri, against the contentions of the plaintiffs in error, such decision will be followed by this Court.*

The provisions of the Kansas City charter and the supplemental ordinance under consideration, passed in pursuance thereof, relating to condemnation proceedings and the assessment of benefits to pay for land taken, having been, as we have seen, construed and upheld against the contentions of the plaintiffs in error by the Supreme Court of Missouri in the Ward case, the Smart case, the Tuller-Seehorn case, *supra*, and in *Kansas City* v. *St. Louis & K. C. Land Co.*, 260 Mo. 395, in this case (Transcript Record 252-264), it is the rule of this Court, as we understand it, to follow such construction and interpretation.

King v. *Portland City*, 184 U. S. 61.
Baltimore Traction Co. v. *Baltimore Ry. Co.*, 151 U. S. 137.
Long Island Water Supply Company v. *Brooklyn*, 166 U. S. 685.
Louisville Railway Company v. *Mississippi*, 133 U. S. 587, l. c. 590.
Merchants & Manufacturers Bank v. *Pennsylvania*, 167 U. S. 461.

Frank J. Willoughby et al. v. Chicago, 235 U. S. 45.
Minnesota Iron Co. v. *Kline,* 199 U. S. 593-7.

The case of *King* v. *Portland City* was one where this Court construed a charter provision of Portland, Oregon, and an ordinance passed in pursuance thereof relative to making assessments for the payment of street improvements in a case very similar to the case at bar, and in that case this Court, at page 70, said:

> "We are of the opinion, therefore, that under the facts of this case and the interpretation given of the charter of Portland by the Supreme Court of the state, plaintiffs in error have not been deprived of their property without due process of law, and the judgment of the Supreme Court is affirmed."

The case of *Baltimore Traction Co.* v. *Baltimore Belt Ry. Co.,* 151 U. S. 137, was one for the condemnation of lands for the use of a railroad. The contention was that the Act authorizing such condemnation proceedings, did not provide for notice to the land owner whose land was taken in violation of the Fourteenth Amendment to the Constitution of the United States. This Court, speaking through its Chief Justice, upon this point, at page 138, said:

> "It was objected below that that section violated the Fourteenth Amendment of the Constitution of the United States, in that the owner of land condemned thereunder might

be deprived of his property without due process of law because the Act did not provide for any notice to him of the proceedings; but it had been previously decided by the Court of Appeals of Maryland that the Act, properly construed, required notice. We are bound to accept this conclusion of the state court as to the proper construction of the statute of the state. *Green* v. *Neal*, 6 Pet. 291; *Davie* v. *Briggs*, 97 U. S. 628; *Louisville, etc., Railway* v. *Mississippi*, 133 U. S. 587, 590. * *

* No suggestion is made that the validity of the statute was drawn in question as repugnant to the Constitution of the United States in any other particular, and as the want of requirement of notice did not exist, the alleged ground of our jurisdiction fails. Writ of error dismissed."

So, in the Tuller-Seehorn case, *supra*, and in the opinion in this case (the two cases growing out of the same proceeding) the provision of the Kansas City charter and the supplemental ordinance numbered 7539 were construed by the Supreme Court of Missouri against the contentions of the plaintiffs in error here. And it was held, as we have seen in those cases, that both the ordinance and the charter provision (Sec. 23, Art. 6) were valid and the proceedings had thereunder were not irregular; and that in the proceedings conducted under that ordinance and the charter provisions authorizing the same, due notice was provided for and observed by which the plaintiffs in error were given an opportunity to be heard upon the amount of

the assessment proposed to be levied against their land and that in and by such proceedings the plaintiffs in error were not deprived of their property without due process of law. The construction of the Supreme Court of the State of Missouri in these cases, it seems to us, comes squarely within the rule laid down in the Baltimore case cited above.

In the case of *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, this Court held:

> "In cases brought here from state courts their decisions are final in matters of procedure, and on alleged conflicts between the statutes of the state and its Constitution."

And it was there further held:

> "In condemnation proceedings for that purpose the assessment of damages may be made by commissioners where the statute so provides, and there is no denial of due process of law in making their findings final as to the facts, leaving open to the courts the inquiry whether there was any erroneous basis adopted by the commissioners in their appraisal, or other errors in their proceedings."

In the case at bar, the provisions of the Kansas City charter (Sec. 23, Art. 6) are that in case errors and mistakes are made in the original proceedings, then supplemental proceedings may be carried on to correct such errors and mistakes in the former verdict and proceedings; that pro-

vision of the Kansas City charter has been upheld by the Supreme Court of Missouri, and we contend that this case upon that feature comes squarely within the rule announced in the Long Island Water Supply Co. case, above mentioned.

The case of *Louisville Railway Co.* v. *Mississippi*, 133 U. S. 587, l. c. 590, was one where the statute of Mississippi requiring separate accommodations for white and colored passengers had been construed by the Supreme Court of the state to apply solely to the commerce within the state. The point was made by the plaintiffs in error there that in making such provision it violated the interstate commerce clause of the Constitution of the United States; but when the case reached this Court, in passing upon the point raised, it adopted the construction of the State Supreme Court of Mississippi, and in doing so, held:

> "The construction of a state statute by the highest court of the state, is accepted as conclusive in this court."

Likewise, in *Frank J. Willoughby* v. *Chicago*, 235 U. S. 45 this Court followed the decision of the State Supreme Court of Illinois interpreting the regularity and legality of a certain condemnation proceeding hereinbefore fully discussed.

In the case of *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593, this court held: "If a State Statute as interpreted by the highest court of the state is not violative of the Federal Constitution, this court will accept the construction of the State Court."

Plaintiffs in Error Have Had Their Day in Court Upon the Only Issue in Which They Have a Legal Interest.

(d) Inasmuch as Section 23 of Article VI of the Charter of Kansas City allows the property owner in the benefit district a hearing upon the amount of benefits assessed against his property, he is not deprived of any right conferred upon him by the Federal Constitution in not having an opportunity to contest the award of damages to another's property, taken or damaged, or to contest the amount of benefits assessed against the property of another person.

In principle, benefits resulting from a public improvement are assessed against property in the benefit district on the theory that such property gets value received from such improvement. The amount of benefits from a public improvement is fixed in a variety of ways for different improvements; for instance, under the Kansas City Charter the property owner pays an average front foot assessment for a street pavement; he pays the proportion which the area of his lot bears to the total area in a sewer district for the construction of a sewer. For grading a street he pays according to the specially assessed value of his lot in a fixed taxing district. Each of these methods of assessment of benefits is held valid, provided the property owner has the opportunity at some time in the proceeding to be heard upon the advisability of the making of such improvement. The assessments thus enumerated are all of them arbitrary and more or less unequal from necessity.

It is difficult for us to understand how it can be contended that a charter provision is invalid, when it allows a property owner to have a hearing in a court of law upon the special issue of whether or not there is a liability of his property to an assessment, and upon the amount of such assessment to be made because of the widening of a street. The plaintiffs in error in this case were each afforded (and all but one of them accepted) an opportunity to contend before a court and jury whether or not their properties were benefited, and the extent of such benefit. There has been a judicial hearing and determination in this cause that the properties of the plaintiffs in error were each benefited by the improvement in question, and the amount of such benefit has been fixed in such proceeding; the Supreme Court of the State has held that such finding was supported by the evidence and was valid. The plaintiffs in error, therefore, have each had their day in court upon the only issue upon which they can be said to have a legal right to be heard in a proceeding of this kind and, therefore, no right conferred upon them by the constitution of the United States has been violated.

Proceedings Under Sec. 23, Art. 6, Were Valid.

(e) Plaintiffs in error complain that the supplemental ordinance did not specify the particular tracts of land omitted from the original proceeding against which the supplemental proceeding was directed. It was not necessary that the sup-

plemental ordinance should specify the exact tracts which had been omitted from the first verdict. It did, however, specify the lands in the benefit district "against which an assessment was, in the first proceeding, wrongfully made, or which was omitted to be made," and "nothing in this ordinance contained shall be held to limit the scope of such supplemental proceedings; but such proceedings shall be deemed to be for the purpose authorized by Art. 6 of the Charter of Kansas City."

At the trial, the proceedings were conducted as Sec. 23, Art. 6, directed, as to the particular piece or pieces of private property sought to be assessed, by the city introducing in evidence the map or plat of the benefit district prescribed by the original ordinance, which showed the tracts of land which had been assessed and paid, and the tracts of land which had not paid, and the jury were instructed, among other things, to assess those tracts which had not paid, if they deemed them benefited by the improvement, and in the proportion in which they were specially benefited, if any, by such improvement, and if they deemed a tract not specially benefited to not assess it, which was done. That is what is meant by the language of Sec. 23, Art. 6, when it says "the proceedings shall be instituted and conducted as to the particular piece or pieces of private property sought to be assessed," and nothing more.

Counsel for plaintiffs in error labor in their attempt to show the various necessary steps which should, as they claim, be taken in an original or

ordinary condemnation proceeding under the Kansas City Charter; and, as we gather it, contend that supplemental proceedings should take the same steps and follow the same course of procedure, *"so far as practicable."* We insist that those very things were done, so far as practicable, and as they should have been under Sec. 23.

The Supreme Court of Missouri, in construing that section, when the matter was before it on the writ of prohibition in the Tuller case, *supra*, directed what was to be done and the manner of doing it. When the case came back for trial, the trial court proceeded along the lines laid down by the Supreme Court for its guidance in this case, and when the matter again went to the Supreme Court of Missouri, what the trial court had done was approved and affirmed.

> *Kansas City* v. *St. Louis & Kansas City Land Co.*, 260 Mo. 395. (Copy opinion, Trans. Rec. 252-264.)

Those decisions were the construction of a local law by the highest tribunal of the state, and an approval of the manner of carrying out the provisions of the local taxing law, which this Court, under its various rulings, many times announced, has said it cannot and will not disturb.

A supplemental proceeding cannot, in the very nature of things, be identically the same in all respects, and in all of its details, as the original proceedings were, else there would be no such thing as a supplemental proceeding. If it was identically the same, it would be tantamount to an original

proceeding. It would be a *de novo* proceeding, and Sec. 23, authorizing such supplemental proceedings, would amount to nothing. There would be nothing to supplement.

The framers of the Kansas City Charter, in their wisdom, foresaw that perhaps just such a situation as was presented here in the condemnation of large tracts of land, for streets, boulevards and parks, necessitating large benefit districts to pay for the same, in a large and rapidly growing and developing city, might occur; and to make ample provision to meet such, or a similar situation, where errors and mistakes were liable to occur, they caused to be drafted and incorporated, and the people of Kansas City, at an election held for the purpose of adopting a charter for their government, adopted Sec. 23 of Art. 6, providing for supplemental proceedings to correct and remedy errors and mistakes in the original proceedings, so that such proceedings might not entirely fail and the whole work have to be done over at an added expense and lengthy delays. Hence, the wisdom of Sec. 23 and its provisions under discussion.

The Supreme Court of Missouri in this case has recognized the wisdom of such a provision, and has approved the section under discussion and its provisions, in the following language:

> "The charter provision is a sensible one. In carrying through condemnation proceedings, errors and omissions, despite care and pains, are likely to arise, where, as here, there are a vast number of tracts and many tract owners involved, and such supple-

mental proceedings are provided for in said charter provision, *inter alia*, 'to properly assess against any piece or parcel of private property against which an assessment was in the first proceeding erroneously made or omitted to be made, the proper amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement,' etc. Certainly, in the case at bar, it is well within the proper use of English to say that the assessments of lots within the district owned by persons who repudiated the proceedings were erroneously made, or were omitted to be made in a true sense. To rule as appellants ask us would crib and confine the charter provisions to bounds too narrow to meet the mischiefs at which it was aimed. Our bounden duty is to construe it (if allowable in reason so to do) to meet those mischiefs, and thus further its evident purpose. Accordingly, the point is disallowed to appellants."

Kansas City v. *St. Louis & Kansas City Land Co.*, 260 Mo. 395, l. c. 415-16. (Copy opinion, Trans. Rec. 261.)

Construction of Supplemental Ordinance.

(f) Sec. 23, Art. 6, means that the court proceedings shall be instituted and conducted as to each piece of land, not that the supplemental ordinance shall specify each tract. The various tracts (about 500) which were either wrongfully assessed or omitted to be assessed in the original proceedings, was a matter of detail evidence, which could not, in the very nature of things, be put in the ordinance authorizing the proceed-

ings, because it was not known exactly which tracts of land had paid their assessment, and which had not, and such fact could not be determined until the trial of the proceedings was had and the evidence heard on those points. And, indeed, the charter provision (Sec. 23) did not require such specification in the ordinance. By its very language, such was not intended; but it was intended by Sec. 23 that the *proceedings*, meaning the court proceedings, and all others after the passage of the supplemental ordinance, should be instituted and conducted as to each tract falling within the range of the ordinance, which was done. This, in effect, was the construction placed upon Sec. 23 by the Missouri Supreme Court in this case.

Counsel for plaintiffs in error in the Supreme Court of Missouri contended, as here, that the ordinance was void because it did not specify each tract of ground against which the supplemental proceedings were directed. In answer to that contention, the Supreme Court of Missouri, in this case, in construing the ordinance in question, at page 418 said:

> "As we gather it, appellants contend that the supplemental ordinance should have described, by metes and bounds, or some definite description, each particular tract of the 13,000 erroneously omitted or erroneously assessed in the original proceeding. We do not think so. If we rule in that way as to the supplemental ordinance, it would follow that the original ordinance should particularize by precision of description each separate tract in the benefit district. Why prescribe such an

enormous publication, descending into so many particularities in which a variation from the fact would breed a new crop of errors and omissions? The settled practice has been not to descend to such particularity. Up to this time, notice to the property owners generally in the prescribed benefit district, and defining the district, as here, have been sufficient to bring in interested parties. It was sufficient in this instance. They came in. Not one of them had any difficulty in finding where the shoe pinched him. Each knew the issue involved, and directed his proof to that issue." (Trans, Rec., pp. 262-263.)

We adopt those views as our argument here, in answer to the contention of plaintiffs in error on this point.

Two Proceedings in Condemnation Cases Are Constitutional.

(g) Plaintiffs in error contend that they were entitled to notice and an opportunity to be heard when their property was to be assessed. Our answer to that is, that they were given notice and had an opportunity to be heard, and were heard, in the supplemental proceeding, when, and only when, their property was assessed; and that all of them, excepting the Bridge Company, responded, appeared at the trial thereof, and vigorously contested the amount of the tax which it was proposed to assess against their property, and some of them got their assessment down as low as $16.16; the aggregate reduction on all was

$3,305.95 less than the first verdict rendered against their properties. (Trans. Rec. 49-50.) Notice and opportunity to be heard at any other time or place was not essentially necessary in order to constitute due process of law, under the authorities cited. It is true that in ordinary condemnation proceedings, under the Kansas City charter, both features of the condemnation proceeding—the awarding of damages and the assessing of benefits to pay such damages—are had in one and the same proceeding; *but* in cases where errors and mistakes have been made in the first proceeding, as happened here, then the charter provides, and wisely so, that a separate (supplemental) proceeding may be instituted and carried on, as was done here, to correct such errors and mistakes. The charter provides for doing the very thing which was done. That provision of the Kansas City charter has been construed and sustained by the Supreme Court of the state as being constitutional, and the proceedings conducted thereunder in the manner in which they were done in this case, has been approved by the State Supreme Court, and that such action on the part of the City was not taking property without due process of law. See the **Tuller case**, *supra*, and *Kansas City* v. *St. Louis & K. C. Land Co. et al.*, 260 Mo. 395. (Trans. Rec. 252 to 264.) That being a construction of a local taxing law, and the manner of the procedure therein by the highest judicial tribunal of the state, will be followed by this Court under the cases cited.

The Michigan Statute, the Ordinance of Detroit, and the New York Statute, provide for sep-

arate proceedings in condemnation matters—one in which the state or municipality exercises its power of eminent domain and fixes the awards for the lands condemned and taken, and the other in which it exercises its power of taxation in assessing land in a taxing, or benefit, district to pay for the land so condemned. Such provisions have been sustained by this Court in the Goodrich, Voigt, and the Spencer-Merchant cases, *supra;* the St. Louis charter provides for separate proceedings, and its provisions have been sustained in *St. Louis* v. *Ranken, St. Louis* v. *Brinckwirth* and *St. Louis* v. *Calhoun, supra,* by the Supreme Court of Missouri. Likewise, the Kansas City charter, in cases like the one here, provides, in effect, for two such proceedings—an original proceeding, and a supplemental proceeding, in the event that a supplemental proceeding is necessary, in order to correct errors, defects and omissions in the first proceeding; and it may happen, as it did in this case, that the original proceeding would be devoted largely to the condemnation feature of the proceeding, while the supplemental proceeding would be devoted entirely to the exercise of the city's taxing power in assessing a part of the benefits which had been erroneously assessed or omitted to be assessed in the first proceeding. The provisions of the Kansas City charter, relating thereto, in this case have been construed and upheld by the Supreme Court of Missouri, in the Tuller case (which was one growing out of this case), and in the final decision in this case, as we have seen. There is nothing unconstitutional

about such provisions, so long as they provide for a notice to the property owner and he be given an opportunity to be heard when it comes to assessing his property. All such safeguards were provided for in the Kansas City charter, in the supplemental ordinance and in the proceedings which followed, and of which the plaintiffs in error, excepting the Bridge Company, took advantage of, appeared and contested the amount of the tax, and they ought not now be heard to complain.

If it is not unconstitutional to have two separate proceedings in condemnation matters, as we have seen by the authorities cited—one for the condemnation branch, and the other the assessing or taxing branch, and Kansas City could have adopted such a method in its charter, then Sec. 23, which provides for a supplemental proceeding, in which, as in this case, the City is simply exercising its power of taxation, then such provision of its charter and the method of exercising that power is not unconstitutional.

See cases heretofore cited.

Observance of Formalities.

(h) *Where the State Supreme Court has held that the formalities of the municipal taxing laws have been observed, there is no Federal question involved where the contention is that the manner of their observance was a denial of due process of law.*

In *French* v. *Taylor*, 199 U. S. 274, it was held that where the plaintiff in error contends that he was denied due processs of law because the state

officers, acting under the state revenue laws, did not fully comply with the statute, only questions of local law and fact are involved and the determination of the state court thereon is not reviewable on a writ of error by this Court. In the course of the opinion, Mr. Chief Justice Fuller, speaking for the Court of this point, at page 277, said:

> "Indeed, counsel for plaintiff in error says in his brief that he does not contend 'that the Act itself is not sufficient to give due process,' but he insists 'that the manner of observance of that Act is want of due process'; in other words, that the statutes had not been complied with. But the State Supreme Court held that the Acts provided for taxation *in rem;* that notice was given as required; that giving the name of the owner was not essential to the validity of the assessment, and that the county officers and defendants in error had fully complied with the laws. So that subdivision 11, in attacking the proceedings, only objects to the determination of questions of local law or of fact, not in themselves reviewable here. *Castillo* v. *McConnico,* 168 U. S. 674, 683; *Leigh* v. *Green,* 193 U. S. 79.
>
> "In *Castillo* v. *McConnico,* in which it was held that it was not the province of the court to interfere with the policy of the revenue laws of the state, nor with the interpretation given to them by their courts, and that an assessment could not be regarded as not constituting due process of law within the Fourteenth Amendment because of error as to the name of the owner, if the state law might have dispensed with any requirement of mention of the name, Mr. Justice White said:

" 'The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the Fourteenth Amendment, and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative or coterminous. The first, due process of law, must be found in the state statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the lawmaking power of the state, and as it is solely the result of such authority may vary or change as the legislative will of the state sees fit to ordain. It follows that, to determine the existence of the one, due process of law, is the final province of this court, whilst the ascertainment of the other, that is, what is merely essential under the state statute, is a state question within the final jurisdiction of courts of last resort of the several states. When, then, a state court decides that a particular formality was or was not essential under the state statute, such decision presents no Federal question, providing always that the statute as thus construed does not violate the Constitution of the United States by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the state interpretation of its own law is controlling and decisive.' "

And so in *Corry* v. *Campbell*, 154 U. S. 629, in a case similar to the case at bar, this Court, speaking through Mr. Chief Justice Waite, said:

"We have no power to correct the errors of state courts in respect to the details of as-

> sessing made by municipal corporations upon private property to defray the expenses of street improvements. Upon all such questions the action of the state court is final. There can be no doubt but that our jurisdiction is at an end if we find that sufficient provision has been made by law for contesting such a charge, when imposed, by an appropriate adversary proceeding in the ordinary courts of justice."

The judgment of the Supreme Court of Ohio in that case was affirmed upon the authority of *Davidson* v. *New Orleans*, 96 U. S. 97.

The Original Proceedings Were Valid as to Those Who Abided the Judgment.

(i) Plaintiffs in error contend that the original proceeding and judgment were void, and, therefore, there was nothing to supplement. In this contention they evidently have overlooked the fact that by the injunction which the property owners whose property was taken secured, it was then determined, among other things, from which no appeal was taken, that the original proceedings had life and were not void as to such property owners who appeared therein and abided the verdict and judgment, and as to those in the benefit district who accepted the verdict and judgment and paid their assessments.

The Supreme Court of Missouri, in *Ex rel. Tuller* v. *Seehorn, Judge*, 246 Mo. 568, l. c. 580, 581 and 582, on this point, when this proceeding was before it on the writ of prohibition, said:

"If the verdict in the original proceedings was valid as to those who appeared and who accepted it, why should it become 'interlocutory' merely because supplemental proceedings were necessary as to the other property, and be entirely vacated because an appeal was taken in such supplemental proceedings? We are of the opinion that the original proceedings, when unappealed from, became *res adjudicata* and not subject to trial *de novo* in the supplemental proceedings, and for the following reasons:

(a) The charter makes no provision for vacating the original proceeding or treating them as interlocutory in case of supplemental proceedings. On the contrary, it is expressly provided that the common council may repeal the ordinance for the proposed improvement 'at any time before any of the parties assessed with benefits shall have paid the amount so assessed, * * * and in such event the judgment for compensation and benefits shall be void.' Under a well recognized principle of construction, the right of the city to avoid the proceedings and judgment before the payment of any benefits, excludes such a right after benefits have been paid.

(b) It is provided by Sec 4 of Art. 6 of the charter that 'no assessment shall be affected or interfered with for the reason that any other assessment or assessments made in the same proceeding may be invalid in whole or in part.' This provision would preclude, as a valid defense to its enforcement of the assessment, the fact that other property benefited was not legally assessed. If the city can enforce the collection of assessments in such cases, it must be for the reason that the judgment is final and not merely interlocutory, and if final as to the city it is also final

as to the property owner. The reason underlying this provision of the charter is apparent, namely, that as the city is given power to subject property omitted by mistake to its proportional part of the cost of the improvement, by a supplemental proceeding, there is no reason why the assessment of other property should not be paid if, as to it, the assessment was regular.

(c) By Sec. 8 of Art. 6 it is provided that when recommended by the board of public works, the city may pay the damages awarded for the property taken and have possession thereof before the assessments for benefits are collected. In such case the assessments, when collected, are credited to a fund to reimburse the city. If after the city had thus acquired the property, a defect should be discovered in the proceedings as to some of the property assessed with benefits, and there was a refusal to pay for that reason, as was done in this case, would a supplemental proceeding to remedy such defect, and an appeal therefrom to the Circuit Court take up the entire case for trial *de novo*, including the ascertainment of compensation for the property taken? Clearly it would not, for the owners would have received the amount awarded as damages, either in the municipal court or on appeal in the Circuit Court, and would have no further interest in the proceedings; and, besides, the city conducting the condemnation proceedings would itself own and be possessed of the property taken.

(d) By Sec. 5 of Art. 6 of the charter it is provided that if the property to be taken is owned by an incorporated company, such company may file in the municipal court a petition demanding a trial by a common law jury. This petition must be filed before the

jury is impaneled, and the entire case, without further action in the municipal court, must then be transferred to the Circuit Court. If supplemental proceedings should be made necessary because of a defect in the taking of property belonging to such a company and a petition as above should be filed in the municipal court, where, in such case, would the supplemental proceeding, as stated by respondent, begin to 'ride with the original proceeding and accompany it through its course?' If at the stage in which the petition is so filed, then it would be before the municipal court acquired jurisdiction of those property owners who were not legally served, but voluntarily appeared.

Many other illustrations could doubtless be given from the several provisions of the charter to show the unsoundness of the construction that an appeal to the Circuit Court in a supplemental proceeding necessitates a retrial of the entire case intended to be included in the original proceeding."

The Judgment in the Union Pacific Affected Only the Rights of Plaintiffs in Error as to Their Assessments.

(j) The judgment which the Union Pacific Railroad Company *et al.* secured against Kansas City and its officers, enjoining them from collecting any benefit assessments under the first, or original, proceeding, only went to the extent of stopping the collection of such assessments against their property made in that proceeding. It did not invalidate the original judgment in any other

respect, and it was so held twice by the Missouri Supreme Court, in this proceeding, when the matter was before it—once upon the hearing of the writ of prohibition in the Tuller case, and again on the final decision of this case which is now before this Court for review.

The decree in the injunction suit reads as follows:

> "It is, therefore, considered, ordered, adjudged and decreed by the court, that said assessments, in so far as they affect or purport to affect plaintiffs, or any of them, or any of their several properties, be, and the same are hereby, annulled and for naught held; that the several assessments against the respective properties aforesaid of the plaintiffs and each of them be and the same are hereby set aside and annulled; the defendant Kansas City, M. A. Flynn, City Clerk, U. L. Weary, Clerk of said Municipal Court, and the officers and agents of said city, be, and they are, each of them, perpetually restrained and enjoined from making out, certifying or contesting any tax bills against the several properties of the plaintiffs, or any of them, under and by virtue of said assessment, and that plaintiffs have and recover from the defendant Kansas City the costs herein expended, and have execution therefor." (Trans. Rec. 125.)

In passing upon and construing that decree, the Supreme Court of Missouri, in this case, at page 414, said:

> (a) "It is argued that the decree in the Flynn case was *res adjudicata;* that the effect

of the ruling in that case was to make void the entire original proceeding, hence there was nothing to supplement by a supplemental proceeding. If appellants' premises were true their conclusion might be allowed as sound. But under our rulings in the prohibition cases, *supra*, the premises are not true, hence the conclusion is unsound. Hereinbefore we set forth the material part of the Flynn decree and therefore it appears that certain assessments alone were made void. The decree was cautious and precise in that regard. Now, in our judgment in the Tuller-Seehorn case the original proceeding so far as the amount of damages for property taken was concerned, and so far as the assessments of benefits on lots whose owners acquiesced in the decree and paid the benefits were concerned, was upheld. We but follow that ruling in disposing of the point in hand as we have done." (Trans. Rec. 260.)

After the injunction aforesaid was granted, the supplemental ordinance now under consideration was enacted, and these supplemental proceedings were instituted, and directed against the property of the plaintiffs in error and others in the benefit district, which had escaped taxation under the first, or original, proceeding.

Rights of Property Owners in Benefit District Were Not Cut Off.

(k) The right given by the charter of Kansas City to property owners in the benefit district to appeal, does not mean, under the law, the right

to appeal from the amount of the award allowed those whose property was taken. It means, and can only mean, under the authorities cited, the right to appeal from the assessment against *his* property, and none other. The plaintiffs in error had the right to so appeal, and they did so when their property was assessed, in the supplemental proceedings, and no right was violated.

Plaintiffs in error complain that they were not accorded the privilege of taking part in fixing the benefits assessed, in the original proceeding, against *other* tracts of land not their own. How could they possibly be interested in that? The only interest which they would have had there, and which they had in the supplemental proceedings, under the authorities cited, was to keep the assessment down as low as possible on their own property, if not to escape entirely, as some of them almost did when they were heard in the supplemental proceedings. By the institution of the supplemental proceedings (made necessary by the facts), the plaintiffs in error were not, and could not have been, discriminated against under the law, as decided by this court in the numerous cases heretofore cited.

Kansas City's Legislative Charter Powers.

(1) The Supreme Court of Missouri in *Morrow v. Kansas City*, 186, Mo., l. c. 683, speaking in reference to the Kansas City charter and its power to legislate upon muncipal affairs, said:

> " 'The powers of legislation conferred upon these municipal corporations to regulate and

> manage their local municipal affairs in conformity to ordinances adopted by themselves, were held of no infringement upon the maxim that legislative power could not be delegated.'"

And in *McGee* v. *Walsh*, 249 Mo., l. c. 281, after quoting the above the court said:

> "These considerations lead us to the conclusion that the provisions of Section 7 of Article 8 of the Charter of Kansas City of 1908, are to be regarded as having the same force as if they had been enacted into a statute by the General Assembly of the State."

In *Ex Parte Robert C. Smith*, 231 Mo., l. c. 122, 123, in construing the charter powers of Kansas City and St. Louis to pass certain ordinances then under discussion, the court said:

> "In this connection it need only be stated that it has been decided in various cases in this court, that a charter power of a freehold city, like Kansas City and St. Louis, under our Constitution, has all the sanction of a legislative enactment by the Legislature. We are of the opinion that the ordinance was clearly within the powers of the city conferred upon it by its charter and that it is perfectly reasonable regulation."

Courts Take Judicial Notice of K. C. Charter.

(m) That the charter of Kansas City is a public act of which the courts take judicial notice

is decided in *Kansas City* v. *Smart,* 128 Mo. 272, l. c. 298, in a condemnation proceeding in which the court said:

> "It will suffice to say that the charter of Kansas City is a public act, of which we are required to take notice."
>
> Sec. 16, Art. IX, Missouri Constitution.

The Bridge Company's Claim.

(n) *The lands of the Bridge Company were not assessed twice.*

The claim of the Bridge Company that its lands—the same tracts—were assessed twice, is not sustained by the record. On the other hand, the Supreme Court of Missouri, in its final opinion rendered in this case, found against the Bridge Company on the fact contended for by it. On this point, we quote from the opinion of Chief Justice Lamm in this case, on pages 419-20-21 of 260 Mo., as follows:

> "The Union Depot, etc., Co. owned a small tract of land in the benefit district, was assessed a small benefit thereon in the original proceeding, and paid the assessment. As we grasp it, it laid claim to shore land on the Missouri river in the benefit district. There were other claimants for this land, and, among them, the city, and a suit was pending in the federal court to determine and settle title. Things were in this fix when the original condemnation proceeding was tried. We think it clear that no assessment whatever was made against this land by the original

verdict and judgment. In the map filed with the original ordinance to initiate the original proceeding, these disputed shore lands were marked 'owned or claimed by the Union Depot Bridge and Terminal Railroad Co., and Kansas City, Missouri,' indorsed across them. The record is not as plain as it might be, and it is possible that different hypotheses might spring because of obscurity, but a study of it leads us to the conclusion that these shore lands were omitted, doubtless owing to the fact that the ownership was in controversy. Between the time of the first verdict and judgment, and the time of the supplemental proceedings, a compromise was made in such federal suit, and by agreement between an aggregation of claimants, certain tracts of these shore lands were given to appellant (the Bridge Company), and certain parts, respectively, to other litigants, and a decree was entered in the federal court, vesting and quieting these respective titles. When the supplemental proceedings were brought to a head by verdict and judgment, the several tracts of shore lands awarded—the present appellant (the Bridge Company) by that decree were assessed with benefits * * * It does not seem this appellant (the Bridge Company) appeared and took part in the trial under the supplemental ordinance and proceeding. It had the same notice by publication all other tract owners had, but it chose the course of keeping in the background. When the verdict came in in the supplemental proceeding assessing the shore land tracts with benefits, it, for the first time, appeared and filed a motion for a new trial. * * * Appellant (the Bridge Company) came into the case late, and on a motion for a new trial. It filed no affidavit of

> newly discovered evidence. It brought to the attention of the court the federal decree on that motion. That was not newly discovered, but we pass the point to let the matter ride off on its merits. We are of the opinion that the land was erroneously omitted in the first assessment, and that appellant (the Bridge Company) ought not to complain over paying its share of the cost of the improvement with his co-appellants and all other property owners in the benefit district." (Trans. Rec., pp. 2[illegible]3-4.)

In any event, no Federal question is thereby presented. Even the assessing of property twice for a public improvement is not taking property without due process of law in violation of the Federal Constitution, and it was so decided by this Court in *Davidson* v. *New Orleans*, 96 U. S. 97, l. c. 106; that was a case to enforce special assessments for a public improvement, and this Court, speaking on this point through Mr. Justice Miller, page 106, said:

> "One of two errors assigned, and not mentioned in the earlier part of this opinion, deserve a word or two.
>
> "It is said that the plaintiff's property had previously been assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the state to tax or assess property twice for the same purpose, we know of no provision in the Federal Constitution which forbids this, or which forbids unequal taxation by the states. If the Act under which the former assessment was made is relied on as a contract against

further assessments for the same purpose, we concur with the Supreme Court of Louisiana in being unable to discover such a contract."

Conclusion.

Under the facts of this case, and the law applicable thereto, as enunciated by this Court in the decisions cited, we submit that plaintiffs in error have not been deprived of their property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution. We therefore respectfully ask that if the motion to dismiss the writ be not sustained, that then the judgment of the Supreme Court of Missouri be affirmed.

ANDREW F. EVANS,
City Counselor of Kansas City, Missouri,
ARTHUR F. SMITH,
JESSE C. PETHERBRIDGE,
Assistant City Counselors of Kansas City, Missouri,
Attorneys for Defendant in Error.

ADDENDA.

For the convenience of the Court we append herewith copies of Section 23 of Article 6 of the Kansas City Charter, the supplemental and original ordinance under consideration.

Section 23, Article 5, Kansas City Charter.

Section 23 of Article 6 of the Kansas City Charter, the basis and authority for the *supplemental* ordinance numbered 7539, and the supplemental proceedings which were instituted thereunder and carried to conclusion, reads as follows:

> "SEC. 23.—*Defective Proceedings — Supplemental.*—When by reason of any error, defect or omission in any proceedings, or in the verdict or judgment therein that may be instituted under the provisions of this Article, a portion of the private property sought to be taken, or some interest therein, cannot be acquired, or an assessment is made against private property which cannot be enforced or collected, or when, by reason of any such defect, private property in the benefit district is omitted, the City may, by ordinance, institute, carry on and maintain supplemental proceedings to acquire the right and title to such property or interest therein intended to be taken by the first proceedings, but which cannot on account of such defect, error or omission, be acquired thereunder, or to properly assess against any piece or parcel of private property against which an assessment was in the first proceeding erroneously made or omitted to be made, the proper amount such private property, exclusive of the im-

provements thereon, is benefited by the proposed improvement to be determined by the verdict of the jury in such supplemental proceedings; and the original assessments may be revived, corrected, increased or diminished as may be necessary or equitable under the provisions of this Article for the original proceedings. Such supplemental proceedings shall be instituted and conducted as to the particular piece or pieces of private property sought to be acquired or assessed in like manner and with like effect as in the original proceedings, and shall be known and described as supplemental proceedings for the purposes specified in the original ordinance; and a supplemental verdict and assessment shall be made, confirmed and copies of the original verdict certified in every particular as in the original proceedings; and the assessments as established and corrected by such supplemental verdict shall be collected by the City Treasurer in the same manner and under like conditions and restrictions, powers and duties as in the case of original proceedings."

The following is a copy of the supplemental ordinance so enacted for the purposes mentioned:

Supplemental Ordinance No. 7539.

"An Ordinance

Providing for, authorizing and directing the institution, carrying on and maintaining of supplemental proceedings to properly assess benefits against certain pieces and parcels of land included within the benefit district prescribed by Ordinance No. 3209, approved October 19, 1909.

Whereas, the Common Council of Kansas City, Missouri, passed an ordinance entitled 'An Ordinance to open and widen Sixth street from the east line of Bluff street to the west line of Broadway and repealing Ordinance No. 1750, entitled "An Ordinance to open and widen Sixth street from the east line of Bluff street to the west line of Broadway," approved July 14, 1909,' which said ordinance was numbered 3209 and was duly approved October 19, 1909, and

Whereas, proceedings were instituted under said ordinance in the Municipal Court of Kansas City to condemn the land in said ordinance described and a verdict was rendered in said Municipal Court, and

Whereas, by reason of certain errors, defects and omissions certain assessments were made against land in the benefit district prescribed by said ordinance which cannot be enforced or collected and certain pieces of private property in the benefit district were omitted and not assessed by said verdict, and

Whereas, in order to pay the total amount of damages awarded for land taken and damaged by said condemnation it was and is necessary and required that said certain pieces and parcels of land shall be assessed if they are deemed benefited by the jury.

Now, therefore, be it ordained by the Common Council of Kansas City:

SEC. 1. That the Mayor and City Counselor are hereby authorized and directed to institute, carry on and maintain supplemental proceedings to properly assess against any piece or parcel of private property within the benefit district prescribed in Ordinance No. 3209, approved October 19, 1909, against which an assessment was in the first proceeding wrongfully made or which was

omitted to be made, the proper amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement, such amount to be determined by the verdict of a jury in such supplemental proceedings as provided by Article 6 of the Charter of Kansas City.

SEC. 2. Nothing in this ordinance contained shall be held to limit the scope of such supplemental proceedings, but such proceeding shall be deemed to be for the purposes authorized by Article 6 of the Charter of Kansas City.

SEC. 3. Such supplemental proceedings shall be begun in Division No. 1 of the Municipal Court of Kansas City and shall be known and described as supplemental proceedings for the purposes specified in said ordinance numbered 3209.

SEC. 4. All ordinances or parts of ordinances in conflict with this ordinance are, in so far as they conflict with this ordinance, hereby repealed."

Original Ordinance No. 3209.

The following is an extract from the original Ordinance No. 3209, under which the original proceedings were authorized and conducted to condemn the land for widening the street:

"An Ordinance

To open and widen Sixth street from the east line of Bluff street to the west line of Broadway, etc

Be it ordained by the Common Council of Kansas City:

Section 1. That Sixth street from the east line of Bluff street to the west line of Broadway, be opened and widened, the boundary lines of which are more particularly described as follows, to-wit:

Beginning at a point on the west line of Broadway one hundred (100) feet south of the northwest corner of Sixth and Broadway; thence west one hundred (100) feet south of and parallel to the north line of Sixth street to the east line of Bluff street; thence northeastwardly along the east line of Bluff street to the southeast corner of Sixth street and Bluff street; thence east along the south line of Sixth street to the west line of Broadway, thence south to beginning.

And all private property within said limits is hereby taken and condemned for public use as a part of Sixth street and just compensation therefor shall be assessed, collected and paid, according to law. The amount allowed for private property taken, shall be wholly raised by special assessments made against the property described in the next succeeding section in accordance with Article VI of the Charter of Kansas City, Missouri.

Sec. 2. The Common Council determines and prescribes the limits within which private property shall be deemed benefited by the improvements herein proposed, and be assessed and charged to pay compensation therefor, as follows, to-wit: (Then follows a technical boundary of the benefit district.)

Sec. 3. (Repealing clause.)

Office Supreme Court, U. S.
FILED
MAR 1 1916
JAMES D. MAHER
CLERK

No. 261.

IN THE

Supreme Court of the United States

OF AMERICA.

OCTOBER TERM, 1916.

ST. LOUIS & KANSAS CITY LAND COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

VS.

KANSAS CITY, DEFENDANT IN ERROR.

SEPARATE STATEMENT AND BRIEF OF THE UNION DEPOT BRIDGE AND TERMINAL RAILROAD COMPANY IN REPLY TO STATEMENT AND BRIEF OF KANSAS CITY.

KENNETH McC. DEWEESE,
730 Midland Bldg.,
Kansas City, Mo.,
Attorney for Plaintiff in Error, Union Depot B. & T. R. R. Co.

Service of copy acknowledged February, 1916. All exceptions as to time of service and filing are hereby waived.

.....
Assistant City Counselor.

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Counsel for defendant in error in their statement of the case (page 6) say:

> "Counsel for plaintiffs in error are either mistaken about the Bridge Company's lands having been assessed twice or they are unfortunate in the language used, as it might convey that idea." The land—the same tract of land—of the Bridge Company were not assessed twice and there is no evidence in the record of such double assessment. It owned several tracts or claimed to own them, in the benefit district. It is true that in the first or original proceedings a certain tract of its land was assessed, which assessment it paid. But the other tracts which it afterwards acquired and which it owned at the time of the supplemental proceedings was not assessed in the original or first proceeding" (Brief of Deft. in Error, page 61).

Plaintiff in error does not contend that its lands—**the same tracts of land** *were assessed twice, or that there* was a double assessment.

This plaintiff in error owned several tracts of land within the benefit district; the ownership of all of which was in controversy and litigation between it and the city when the original proceedings were conducted. In the original proceedings a portion of its lands was assessed with benefits, which assessments it paid; other portions were not assessed with any benefits. The portions not assessed in the original proceedings were assessed with benefits in the supplemental proceedings. The portions assessed in the original proceedings were not again assessed in the supplemental proceedings. Its lands were not assessed twice in the sense that there was a double assessment. No such contention has ever been put forward. The particular contention of this plaintiff in error is that portions of its lands were in the original proceedings assessed with benefits—which it paid—and that a portion of its lands were not assessed with benefits, and that by its paying the assessment of benefits, "the verdict and judgment in the original proceedings became valid and binding as to those who appeared and accepted them," and that by reason of the recitations contained in the verdict of the jury, the lands not assessed with benefits, were deemed by the jury not to be benefited by the proposed proceedings, and was not an *omission* of them from the verdict; that this fact of no benefit could not be again inquired into, in the supplemental proceedings but that all were bound and concluded by the findings and recitations contained in the verdict of the jury.

COPY BOUND

A STATEMENT OF THE CASE.

A statement of the substantial facts of the matter involved in controversy herein, prior to trial, in the Circuit Court, of the supplemental proceeding, can be found in the opinions of the Supreme Court of Missouri in the cases of *State ex rel. Graham et al.* v. *Seehorn et al.*, 246 Mo. 541, and *State ex rel. Tuller et al.* v. *Seehorn*, 246 Mo. 568, reference to which is here made.

For a statement of facts supervening since that time, reference is made to the statement contained in the joint brief of all plaintiffs in error herein.

In order to show how the Union Depot Bridge and Terminal R. R. Co. became an actual party to the record, both in the original as well as in the supplemental proceedings, the following statement of facts is made:

The verdict in the original proceeding in the Municipal Court under Ordinance No. 3209, was in the following form, to-wit:

In the Matter of Opening and Widening of Sixth Street From East Line of Bluff Street to the West Line of Broadway.

VERDICT.

State of Missouri, County of Jackson, Kansas City, ss.

In the matter of the proceedings to ascertain and assess just compensation to be paid for private property taken for public use for the purposes specified in an Ordinance of Kansas City, No. 3209, entitled "An Ordinance to open and widen Sixth Street from the East line of Bluff Street to the West line of Broadway and repealing Ordinance No. 1750, entitled 'An ordinance to open and widen Sixth Street from the East line of Bluff Street to the west line of Broadway,'" approved July 14, 1909, approved the 19th day of October, 1909, we the undersigned jury on oath having heard the proof of the several parties interested and examined personally the property to be taken and assessed, render our verdict as follows, to-wit:

We ascertain the actual value of the property taken and damaged by reason of opening and widening said Sixth Street from the east line of Bluff Street to the west line of Broadway under said Ordinance No. 3209, and also the actual damages done to

TO CLOSE IN CENTER

each piece of private property not actually taken by reason of these proceedings as just compensation therefor to be as follows, to-wit:

(Here follows the total assessment of damages.)

To pay the just compensation so ascertained for the private property taken and damaged as aforesaid, we assess against Kansas City the amount of benefit to said city and the public generally inclusive of benefit to all property of said city within the benefit district the sum of $3238.39.

And against the several lots, tracts, and parcels of private property deemed benefited, exclusive of the improvements thereon, as determined according to Section 3, Art. VI of the Charter of Kansas City by the proposed improvements the balance of such compensation assessing each lot or parcel of ground to be assessed with an amount bearing the same ratio to such balance as the benefit to each lot or parcel of ground bears to the whole benefit of all the private property assessed, as follows:

* * * * * * * * *

(Here follows a description of private property deemed benefited, including, among many others, the particular tracts upon which this plaintiff in error paid the assessments and then the verdict concludes as follows:)

> "Against all those lots, parce's of land lying within the benefit limits as prescribed by Ordinance No. 3209 for the opening and widening of said Sixth Street from the east line of Bluff Street to the west line of Broadway and not hereinbefore mentioned and described, we assess no benefits."

This verdict was filed March 7th, 1910, and confirmed March 8th, 1910. These assessments were paid by U. D. B. & T. R. R. Co. June 30th, 1910, together with assessments made against other of its property not now in question amounting in all to $606.57.

Against the property in the benefit district, as mentioned and described in the motion of plaintiff in error for new trial and rehearing the jury made no assessment of benefits, in the original proceedings. At the time of the verdict, the ownership of all this property was involved in litigation in the United States Circuit Court to which the city and plaintiff in error were parties, both claiming to own the land. This accounts for the fact that on the map or plat filed with the ordinance, the words "owned or claimed by 'Union Depot Bridge and Terminal Railroad Company' and Kansas City Missouri" are endorsed across these tracts.

The contention of the plaintiff in error is that by reason of making the payment of the assessment as stated, it became an actual party to the record in the original proceedings in the Municipal Court under Ordinance 3209, for all purposes and that therefore, as to it and all its property, all matters and things adjudicated therein are now *res adjudicata* and cannot be again re-litigated in this supplemental proceeding.

If the tracts described in the motion for new trial, were at the time of the verdict in original proceedings owned by and belonged to the city then they were embraced and included within the language of the verdict assessing benefits as follows:

> "To pay the just compensation so ascertained for the property taken and damaged as aforesaid, we assess against Kansas City as the amount of benefit to said city and public generally, **inclusive of benefit to all property of the city within the benefit district the sum of $3238.39.**"

If said tracts were not owned by city but were owned by the plaintiff in error then they were embraced and included in the final finding of the jury in the following language of the verdict, to-wit:

> "Against all those lots, tracts and parcels of land lying within the benefit limits as prescribed by Ordinance No. 3209 for the opening and widening of said Sixth Street from the east line of Bluff Street to the west line of Broadway and not hereinbefore mentioned and described *we assess no benefits.*"

The verdict of the jury in the Municipal Court, in the supplemental proceedings made no assessment against the lands described in the motion of plaintiff in error for a new trial. This was not done until the verdict in Circuit Court, which verdict is as follows:

In the Matter of the Supplemental Proceedings for Opening and Widening of Sixth Street From the East Line of Bluff Street to the West line of Broadway. No. 60282.

VERDICT.

State of Missouri, County of Jackson, Kansas City.

In the matter of the supplemental proceedings to ascertain and assess benefits against certain pieces and parcels of land included within the Benefit District prescribed by Ordinance No. 3209, approved October 19, 1909, and entitled, "An Ordinance to open and widen Sixth Street from the east line of Bluff Street to the west line of Broadway," and by authority of Ordinance No. 7539 ap-

proved February 18, 1911, which is supplemental to the first ordinance and entitled, "An ordinance providing for, authorizing and directing the institution carrying on and maintaining of supplemental proceedings to property, assess benefits against certain pieces and parcels of land included within the benefit district prescribed by Ordinance No. 3209, approved October 19, 1909," we the undersigned jury on oath, having heard the proof of the several parties interested and examined personally the property to be assessed, render our verdict as follows, to-wit:

To pay the balance of the compensation allowed for private property taken and damaged as ascertained in a prior proceeding under said Ordinance No. 3209. We assess against Kansas City in addition to what has heretofore been assessed under the original proceedings as the amount of benefits to said city and the public generally, inclusive of the benefit to all the property of said city within the benefit district, the sum of one ($1.00) dollar, and we do assess against those several lots or parcels of private property within the benefit district prescribed by Ordinance 3209, in said prior proceedings against which an assessment was wrongfully made and not paid, or, against which an assessment was omitted to be made as shown by the evidence, and which lots or parcels of private property are deemed benefited exclusive of improvements thereon by the proposed improvements, assessing each lot or parcel of land of ground in the proportion which we deem each tract, lot or parcel of land is benefited, and upon which assessments were wrongfully made in the original proceedings in the same ratio to the full amount to be assessed by us as the benefit to each lot or parcel of land bears to the balance of the benefits to all the private property so assessed by us in said benefit district described as follows, to-wit:

Against all that part of the northeast ¼ of the northeast quarter of Section 32-50, Range 33, which lies south of a line two hundred feet south of and parallel to the U. S. Harbor Line of 1904, $162.36.

Against all that part of the southeast ¼ of the northeast ¼ of Section 32, Township 50, Range 33, which lies north of Old Town Reserve and south of a line drawn 200 feet south of and parallel to the south line of U. S. Harbor Line 1904, $3,130.38.

Against all that part of the southwest ¼ of the northeast quarter of Section 32, Township 50, Range 33, which lies south of a line 200 feet south of and parallel to the south line of U. S. Harbor

Line of 1904, excepting also Holmes, Charlotte and Campbell Streets, $1524.20.

And we further find that the assessments heretofore levied in said prior proceedings against the lots or parcels of land within the limits of the benefit district which have been paid are equitable and we do not deem it necessary or just that said assessments be increased or diminished.

Against all those lots and parcels of land lying within the benefit limits as prescribed by said Ordinance No. 3209, for the opening and widening of Sixth Street from the East line of Bluff Street to the west line of Broadway and not hereinbefore mentioned and described, we assess no benefits."

This verdict was filed on the 28th of June, 1913. Thereafter and within four (4) days, to-wit, on July 2d, 1913, this appellant filed its motion herein for a new trial and rehearing (Record, p. 165) and assigned therein as its 10th reason, viz:

> "For the reason that the assessments of benefits against the lands owned by it, embraces and includes lands not owned by it and that the assessments against the same are in whole and in gross" (Rec. p. 167).

It is here to be noted that it was between the date of the verdict in the supplemental proceedings in the Municipal Court, and the date of the verdict in the same proceedings in the Circuit Court, June 28th, 1913, that the decree was entered in the proceedings in the Federal Court above referred to, quieting the title to the tracts of land described in the motion of plaintiff for a new trial, in the Union Depot Bridge and Terminal Railroad Company.

All motions for new trial were set down for argument on September 13th, 1913 (Rec. 180). On that day the court ordered that the jury return of September 16th and receive additional instructions as to their verdict (Rec. 184). On the 16th, further instructions were given to the jury concerning the correction of the verdict and they were ordered to return and report on September 18th on which day a corrected verdict was filed (Rec. 188). This correction was intended to meet the 10th reason set forth in the motion for new trial above referred to and to this extent its motion was sustained.

ASSIGNMENT OF ERRORS.

(See Joint Brief of Plaintiffs in Error, pp. 20-26.)

ARGUMENT.

I.

Res Adjudicata.

By the VII amendment to the Constitution of the United States of America, it is among other things provided:

> "No fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

This second clause of the seventh amendment is substantial and independent, and applies to all cases which have been tried by a jury in the State Courts. Authorities to this effect are abundant and conclusive.

A federal court will refuse to re-examine findings of fact, even erroneously made by a jury in condemnation proceedings in a State Court.

> *Chicago etc. Rwy. Co.* v. *Chicago*, 166 U. S. 243; 41 Law Ed. 979.

In the matters now under consideration a jury in the municipal court in the original proceedings, returned a verdict which became final. No appeal from it was prosecuted. Certain of the lands of the Union Depot Bridge and Terminal R. R. Co. were assessed with benefits, which it paid promptly. By making this payment it became a party thereto *in personam*. The verdict in the case concludes:

> "Against all those lots and parcels of land lying within the benefit limits as prescribed by Ordinance," etc. * * * "*and not hereinbefore mentioned and described, we assess no benefits.*"

Certain of the lands described in the motion herein of the Union Depot Bridge and Terminal R. R. Co. and within the benefit were not assessed with benefits in the original case in the municipal court. By its verdict in that case the jury found and ascertained that those lands were not benefited.

This amounts to a specific finding and declaration by the jury that such lands were not benefited, for under their oaths and the instructions of the court, had the lands, as matters of fact been

benefited, it was the bounden duty of the jury to assess such benefits. Not to so assess them had the jury found them to be benefited, would be violative of their oaths and of the instructions, neither of which is to be presumed, but must affirmatively appear from the record. This finding of the jury became a finality and binding and conclusive upon the city, so that the land could not be lawfully assessed with benefits in the subsequent supplemental proceedings in the same matter.

That the particular lands were not benefited had been determined by the jury in the municipal court and could not be again inquired into in this supplemental proceeding. This alone is sufficient to authorize the setting aside of the verdict in this supplemental proceeding and directing a rehearing herein.

It has been expressly held that from the words of the verdict, to-wit:

> "Against all property in the benefit district not hereinbefore specifically described and assessed with benefits we find and assess no benefits,"

it cannot be said that any property in the benefit district was *omitted* from the assesment.

Kansas City v. *Bacon*, 147 Mo. 259.

The land in question was not omitted to be assessed by the verdict in the original proceedings. If the land belonged to the city, it was embraced and included in the finding in the verdict, viz:

> "To pay the just compensation so ascertained for property taken and damaged as aforesaid we assess against Kansas City as the amount of benefit to said city and the public generally **inclusive of ALL property of the city within the benefit district** the sum of three thousand two hundred thirty-eight Dollars and thirty-nine cents ($3,238.39)."

If the land was owned by plaintiff in error then it was embraced and included in final finding of the jury at the end of its verdict, to-wit:

> "Against all lots and parcels of land lying within the benefit district, * * * and not hereinbefore mentioned and described, we assess no benefits."

It was not necessary in the proceeding to ascertain by evidence or otherwise under which of the above findings the jury included

it. There is no escaping the necessary conclusion that it is surely included within the one or the other.

Are we to understand that the jury being in doubt as to who owned the property, could not make up its mind as to whether the lands were benefited or not, until the question of ownership was first decided, as though the question of benefit or no benefit depended upon ownership? And this, when it was no sort of the business of jury who owned it?

The ownership of the lands assessed with benefits by the verdict of the jury in the original proceeding (which plaintiff in error paid) was involved in the controversy between the city and appellant.

The lands upon which the plaintiff in error paid the assessment of benefits made in the original proceedings were part of the lands in controversy between the plaintiff in error and the city. The record so shows.

Abst. of Rec. pages 232-244 and 185-187.

All the lands—those assessed in original proceedings as well as those not assessed—lie north of Front Street.

At the time of the verdict in the original proceedings in the Municipal Court, the ownership of the lands upon which the plaintiff in error paid the benefits under the assessment therein made, as well as the lands now in question herein was in controversy between the city and plaintiff in error, the *former* was assessed with benefits; the *latter* was not assessed with any benefits. This failure to assess with benefits was not therefore an *omission* of the lands from the verdict, on account of a "doubt" in the minds of the jurors, about the ownership of the lands, and the law is that by reason of the concluding words of the verdict they were not *omitted* from assessment. The jury was not instructed to omit them from assessment. They were therefore included.

Kansas City v. *Bacon*, 147 Mo. 259, l. c. 280-281.

To assess the lands *specially* with benefits at that time would have been an adjudication that the lands were *private property* and therefore subject to special assessment. The lands could not be specially assessed with benefits *unless* they were *private property*. This would have defeated the city's claim to title and ownership, and placed it in the conflicting positions of contending at one time and place that the lands were private property and at another time

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and place that the lands were public property. This is not allowable.

Litchfield v. *Webster Co.*, 101 U. S., 25 Law Ed. 925.

From this it must conclusively appear that there was no *omission* of the lands in question, from the verdict in the *original* proceedings in the municipal court.

The court erred therefore in refusing to give instruction No. 1 as requested by the plaintiff in error (Rec. pages 185-187).

For the reasons urged hereunder, the judgment should be *reversed* as to this plaintiff in error and the proceedings dismissed as to lands owned by it, even though the judgment be affirmed as to the other plaintiffs in error. It is this point which distinguishes its case from that of the other plaintiffs in error herein. Otherwise the matters involved are identical and this plaintiff joins in the briefs and arguments of its co-plaintiffs in error.

The Circuit Court erred in overruling appellant's motion in arrest, and the Supreme Court of Missouri erred in not reversing the Circuit Court for that reason. The record is always open and subject to the general demurrer. The motion in arrest is addressed to face of the record.

> "No fact once tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

2. Clause VII, Amendment Constitution U. S.

This clause applies to all cases which have been tried by a jury in the State Courts.

The jury in the original proceedings in the Municipal Court by the verdict, found and reported, viz:

> "Against all those lots and parcels of land lying within the benefit limits as prescribed by Ordinance, etc. * * * and not hereinbefore mentioned and described, *we assess no benefits.*"

Here was a finding of fact by a jury.

The Municipal Court had jurisdiction of the subject matter of the controversy, even though it may not have acquired jurisdiction over the person of this defendant—plaintiff in error.

It was decided in the Tuller-Seehorn case, **"that the verdict and judgment in the original proceedings were valid and binding as to those who appeared and accepted them."**

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Hence as the original proceedings were initiated and prosecuted by Kansas City, and as the Union Depot Bridge and Terminal Railroad Company *"appeared and accepted"* the verdict and judgment, by paying the benefits assessed, therefore, the verdict and judgment became final and binding upon *both alike*. The verdict and judgment cannot at the same time be both valid and binding and also a "nullity." The lack of notice was supplied by "appearance and acceptance." The plaintiff in error did not come into the original proceeding pursuant to notice of any kind, "good" or "bad," but by reason of the fact that its lands had been assessed with benefits *which it paid*.

Therefore, the opinion is in conflict with the second clause of VII. Amendment to Constitution United States, as well as in conflict with Section 1 of the XIV Amendment, and of Section 30 of Article 2 of the Constitution of Missouri.

Special Assessment and Special Taxation.

Special assessments and special taxation are not the same.

Special assessments cannot be made unless the property is specially benefited. The *benefit* is one thing and the *assessment* is another. The assessment made may be less than the benefit and never can exceed it, so that the very right to assess it is based on the idea that the property is benefited. This principle is not true *in special taxation*, for in the latter cases the property is simply charged with its proportionate part of the cost of the improvement made, and this without regard to whether or not the property is benefited at all. "Special taxation" is exercised by the *legislative power*, but "special assessment" is exercised through *the judiciary*. Let me make this plain. On a judgment for special benefits an execution issues without more, for there has already been a judgment rendered.

While in cases of special taxation a suit must be brought upon the special tax bill, in which suit all defenses may be made, but no execution issues in such a case until a judgment is recovered.

Gray's "Limitations on Taxing Power," Sec. 1940-45.

A failure on the part of the city's counselors to recognize this distinction between "special assessment" and "special taxation," has led them into confusion and error. Special assessments can never exceed the benefits found by the jury. Special assessments must bear some relevancy to the benefits ascertained by the finding of the jury. Special taxes bear no relevancy to benefits, but to the cost of the work.

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It is respectfully submitted that it was found by the jury in the original proceedings—that the lands assessed with benefits in the supplemental proceedings—were not benefited and that this fact having been so found by the verdict in the original proceedings could not again be inquired into in the supplemental proceedings.

The case as to this plaintiff in error should be reversed with directions to the Supreme Court of Missouri to reverse the judgment of the Circuit Court of Jackson County, Missouri, at Kansas City.

Respectfully submitted,

KENNETH McC. DEWEESE,
Attorney for Plaintiff in Error, Union Depot R. & T. R. R. Co.

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OFFICE SUPREME COURT, U. S.
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JAMES D. MAHER
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 261.

ST. LOUIS AND KANSAS CITY LAND COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL., PLAINTIFFS IN ERROR,

vs.

KANSAS CITY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

I. N. WATSON,
EDWARD WHITE,
H. M. LANGWORTHY,
KENNETH McC. DE WEESE,
Attorneys for Plaintiffs in Error.

ANDREW F. EVANS,
City Counselor of Kansas City, Mo.;
ARTHUR F. SMITH AND
JESSE C. PETHERBRIDGE,
Assistant City Counselor,
Attorneys for Defendant in Error.

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REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

I.

Defendant in error contends that the city could have provided legally in its charter for two separate hearings, one hearing for the property-owner whose property was to be taken, and another hearing for the property-owner whose property is to be assessed benefits to pay the damages, and that

that, in effect, is what was done by Kansas City in providing for a supplemental hearing. There are several answers to this contention. First. The city did not provide separate hearings. It is provided in its charter, with respect to the ordinance, which is the very foundation of the entire proceeding, that the common council shall, by ordinance, prescribe the property proposed to be taken and also the limits in which property will be benefited by the proposed improvement. The court makes one general order, and in that order the court appoints a day and place for empaneling a jury to ascertain the compensation to be paid and to make assessments to pay the same.

Said order shall recite the number and title of said ordinance with the date when it took effect, and contain a description of the property proposed to be taken or damaged as contained in said ordinance and also a description of the property contained in the benefit district as described in said ordinance, naming the day and place fixed by said court for empaneling a jury to ascertain the damages to be allowed and the benefits to be assessed. This order is published and is directed to "all persons whom it may concern without naming them." The jury are required to personally examine each piece of property taken or damaged and each piece of property to be assessed benefits. There is but one order and one publication, and when that publication is properly made every property-owner in the entire district is in court. The one order and one publication is either good as to all or it is bad as to all. Either all property-owners in the benefit district, whether resident or nonresidents, are properly summoned or they are not summoned. Hence the publication of such order is jurisdictional and brings in all property-owners in the benefit district or else it brings in none, and if they are in court at all, then they have the right to offer evidence and have the right of appeal, whether they own property proposed to be taken or damaged or own property to be assessed benefits. Hence it is

no answer to our contention that the city charter could have provided separate proceedings, because it did not do so, and the city must comply strictly with the procedure provided in said charter or else the proceedings are null and void. (See authorities cited in main brief at page 26.)

Second. The supplemental proceeding provided for in section 23 of article 6 is for the purpose of correcting certain errors in a judicial proceeding, and is not a separate and distinct proceedings where only property-owners whose property is assessed benefits may be heard. This section is for the purpose of correcting any mistake in the proceedings where property is taken or damaged, and not for the mere purpose of hearing and assessing property-owners whose property is in the benefit district.

This supplemental proceeding, by its terms, must be carried on in the same manner and with like effect as in the original proceedings.

The argument of defendant in error makes the city council pass an ordinance dividing the benefit district into two parts, and in one part of the proceedings it permits the property-owners to voluntarily accept the illegal assessments, and in the other proceeding, if a property-owner in the same benefit district does not accept such illegal assessment, he is deprived of the right of having a hearing on the amount of total benefits arising from the proceedings and how such benefits shall be apportioned. It also deprives the property-owner who does not accept said illegal assessment of the right to have his benefits assessed and determined by the ratio prescribed in the charter.

The argument of defendant in error necessarily asserts that after the common council has fixed and prescribed the boundaries of the benefit district the city can ignore the publication of the order of court and proceed to make assessments which are illegal, and then begin supplemental proceedings and divide the benefit district into another and distinct district and deprive the property-owners in such sup-

plemental district of a valid notice to which they were entitled in the original proceedings and cut them off from a hearing provided by the charter in the original proceedings. There is no authority for the common council dividing up an established district into two parts and according rights to property-owners in one part of the district which is not accorded to property-owners similarly situated in the other part of the district.

Third. The court will see by section 23 aforesaid that it has no specific provision for a notice by publication to either a non-resident property-owner whose property is to be taken or damaged, or a property-owner, either resident or non-resident, whose property is to be assessed benefits. Therefore, if the contention of defendant in error is correct that the property-owners in the benefit district are not entitled to notice by a publication of the court's order, as provided in section 2 of article 6 of the charter, then, manifestly, the property-owners in the benefit district, in the supplemental proceedings, are not entitled to notice. For it is only by reason of the fact that such supplemental proceedings are carried on in like manner and with like effect as in the original proceedings, that it can be claimed that a notice is required in the supplemental proceedings. It is because a notice to property-owners in the benefit district must be given in the original proceedings that it becomes necessary to give such notice in the supplemental proceedings, and the logical conclusion of the contention of defendant in error is that no notice of any kind is necessary to be given property-owners in the benefit district, and this would obviously be unconstitutional.

Such is the logical effect of the decision of the Supreme Court in this case.

Fourth. The contention of defendant in error, as well as the decision of the Supreme Court of Missouri, is that the original proceedings were valid and binding upon both the city and Tuller *et al.* The decision of the Supreme Court,

in 246 Mo., 575, is that, because certain property-owners who were relators in said case voluntarily came into court and accepted the award made by the jury in the original proceedings, they were estopped to question the validity of such proceedings, and the court further say that both relators and respondent in that case were committed to the proposition that the original proceedings were valid and binding up to a certain point, and it was upon such an assumption that the decision was predicated. Then, with that assumption, the court held that the judgment rendered in said cause was not interlocutory and proof could not be adduced in the supplemental proceedings on the amount of damages to be awarded the relators in that case, but that the judgment was final in the absence of any appeal, and it was *res judicata* upon the question of the value of the property taken or damaged. Hence, because the relators in said cause had voluntarily appeared and accepted the proceedings as binding, and because certain property-owners in the benefit district had appeared and accepted the assessment of benefits and had paid the same, all such parties were bound by such proceedings. And further, that under such conditions such proceedings became final and binding upon other property-owners in the benefit district, who had no notice of such proceedings and had not appeared and accepted the same. In other words, if B voluntarily appears to an action by A against B and C, where no valid service is had, if B voluntarily appears so as to bind him by a judgment, therefore the same is binding upon C, who had no notice and never had his day in court. We submit that such conclusion is the logical result of the decision of the Supreme Court of Missouri and the result of the argument of defendant in error. Both positions assume and hold that a party is bound by court proceedings where the court had acquired no jurisdiction over him and he had made no appearance. If such decision is not taking property without due process of law, then we fail to understand what constitutes due process of law.

II.

The defendant in error relies upon the case of Spencer *vs.* Merchant, 125 U. S., 345, as being decisive of this case. But we differ with the learned counsel for defendant in error upon the effect of this decision. The decision in the Spencer case grew out of the act of the legislature of New York, where certain assessments had been held invalid in case of Stuart *vs.* Palmer.

In Stuart *vs.* Palmer, 74 N. Y., 183, the legislature of the State passed an act to "lay out, open, and grade Atlantic avenue, in the town of New Lots, in Kings County." The act provided for two assessments, one for damages to the owners of property taken. It provided that the Supreme Court should appoint three commissioners, who should proceed to lay out the avenue as directed by said act, and if the owners did not convey the requisite land to the town, then they should take the land and estimate the value thereof and award damages for taking the same, and that they should assess the amount of the award upon the lands benefited in proportion to the benefits. The act made ample provision for notice to and hearing of all persons interested before the making and confirmation of the award and assessment.

Section 4 of said act provided that upon the confirmation of their report they should be authorized to enter upon the lands and cause the same to be graded and otherwise improved, etc., and to assess the benefits from such improvements upon the lands which, in their judgment, would be benefited in proportion to the benefits, and should certify such assessments to the supervisor of the town, and these assessments should become a part of the annual tax for the ensuing year. There were two assessments provided for, one for damages for property taken and another for improving the street. The former assessment was to be made upon proper notice. The latter no notice was required. Under this

act commissioners were appointed, and they proceeded to make the improvements of the avenue at a large expense, and made assessments upon lands they deem benefited, and certified the costs to the supervisor, and such assessments were added to the annual tax of the land-owners, and a tax warrant was issued for the collection thereof. The plaintiff brought an action to remove such lien as a cloud upon his title. One of the grounds urged was that no notice or hearing was given the plaintiff as to the assessments. This was admitted as a fact. It was claimed property-owners were not entitled to notice under the law. The court found that no notice of any kind concerning the assessments was ever published or given to the plaintiff or other property-holders. The trial court ruled that the plaintiff was not entitled to notice and gave judgment against the plaintiff. The Court of Appeals held that the assessment was void for want of notice, and affirmed the judgment on the ground that the assessment being void did not constitute a cloud on plaintiff's title. The court say:

> "It . . not disputed that the legislature has unlimited power (except as restrained by the Fed. Constitution) to impose taxes and assessments for public purposes. It may impose taxes upon all property within the State; and in such cases the owners are supposed to receive a compensation for the burdens thus imposed in the protection and benefits of the government under which they live. * * * It may cause or authorize local improvements to be made and authorize the expense thereof to be assessed upon the land benefited thereby." (Then follows the quotation in the original brief, beginning at page 58.)

Spencer *vs.* Merchant, 100 N. Y., 585, grew out of same acts as the case of Stuart *vs.* Palmer, 74 N. Y., 183. Some of the assessments made under the act of 1870 had been paid, but a portion of them were canceled and returned by the collector to the treasurer of Kings County and by him

to the State comptroller, whereby the State became indebted to Kings County for such amount, which it was the object of the act of 1881 to collect, etc. The Court of Appeals of New York, in passing upon the constitutionality of the act of 1881, say:

> "The act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason (citing cases). The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made; the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881 the legislature imposes the unpaid portion of the cost and expense with the interest thereon upon that portion of the property benefited which has thus far borne none of the burden. In so doing it necessarily determines two things, viz., the amount to be realized and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review."

And the court, further on in its opinion, say:

> "No hearing would open the discretion of the legislature or be of any avail to review or change it."

It was held that the act of 1881 was constitutional. On a writ of error to this court this case was affirmed by a divided court. In passing upon the questions presented in the majority opinion, this court say:

> "The power to tax belongs exclusively to the legislative branch of the government. * * * The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion."

And again, in the same opinion, this court say:

> "In sec. 4 of the statute of 1869, the assessment under which was held void in Stuart *vs.* Palmer, 74 N. Y., 183, for want of any provision whatever for notice or hearing, the authority to determine what lands, lying within 300 feet on either side of the street, were actually benefited, was delegated to commissioners. But in the statute of 1881 the legislature itself determined what lands were benefited and should be assessed. By this statute the legislature, in substance and effect, assumed that all the lands within the district defined in the statute of 1869 were benefited in a sum equal to the amount of the original assessment, the expense of levying it and interest thereon, and determined that the lots upon which no part of that assessment had been paid, and which had therefore as yet borne no share of the burden, were benefited to the extent of a certain portion of this sum. That these lots as a whole had been benefited to this extent was conclusively settled by the legislature."

This court, in the majority opinion, distinguished the case of Spencer *vs.* Merchant from Stuart *vs.* Palmer for the reason that in Stuart *vs.* Palmer, the act of 1869, the authority to assess lands lying within the prescribed benefit district had been committed to commissioners, and therefore notice of a hearing was essential to constitute due process of

law, while by the act of 1881 the legislature determined for itself what lands were benefited and in what amount.

In the case at bar the common council had only such powers as was conferred by section 23 of article 6 of the charter of Kansas City. It was not vested with the power of the legislature to declare what lands were benefited and in what an amount. That section provides that when certain errors, defects or omissions have occurred in the original proceedings the city may, by ordinance, institute, etc., supplemental proceedings to acquire the right, etc., the proper amount such private property is benefited by the proposed improvement, to be determined by a jury in such supplemental proceedings, and the original assessments may be revised, corrected, increased or diminished as may be necessary or equitable under the provisions of this article for the original proceedings. Such supplemental proceedings shall be instituted and conducted as to the particular piece or pieces of private property sought to be acquired or assessed in like manner and with like effect as in the original proceedings and shall be known and described as supplemental proceedings for the purposes specified in the original ordinance.

The authority given to the city is to correct errors and defects in the original proceedings, and nowhere in the charter provisions governing condemnation proceedings is the common council given legislative authority to determine what particular piece of property was damaged or benefited and, if so, in what amount. Here the council of Kansas City has nothing to do with assessing and fixing the amount of damages nor the amount of benefits. Those questions are left to the jury to fix and determine, and all the authorities hold that when the legislative body commits the ascertainment of damages or the assessment of benefits to a jury or commissioners, notice at some stage of the proceedings must be given the property-owner who is to be assessed benefits in order to constitute due process of law. Hence we contend that under the

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decision of this court in Spencer *vs.* Merchant this very distinction is made in distinguishing the case of Stuart *vs.* Palmer from Spencer *vs.* Merchant.

III.

The statements made in the city's brief (p. 2) relative to the importance of Sixth street as a thoroughfare, and the increasingly congested condition thereof, are not supported by the evidence. It appears from the evidence adduced at the trial, which took place in the year of 1913, almost four years after the original ordinance providing for the widening of Sixth street was passed, that the location of the Union Station in Kansas City was about to be changed, and that this would remove the Union Station traffic over Sixth street, and that subfreight stations were about to be built up town, and that this would remove a large portion of the freight-station traffic over Sixth street (Rec., pp. 69-71), and that other traffic ways were in process of being built connecting with the West Bottoms, and that these traffic ways would reduce the traffic over Sixth street (Rec., pp. 71-81); and, further, that the viaduct connecting with Sixth street and leading to Kansas City, Kansas, was a toll viaduct, with a necessarily limited amount of traffic (Rec., p. 79). Sixth street was thus reduced to an unimportant side entrance to the West Bottoms, with a constantly decreasing amount of traffic. The city admits that it attempted to "abandon the proceedings," and that it was only because of injunction proceedings that it did not do so (City's Brief, p. 3). It is obvious that the necessity for widening Sixth street, if it ever existed, has long since disappeared, and that the real problem which confronts the city is not that of providing means for the carrying out of a needed public improvement, but rather how it may extricate itself from the legal difficulties which have resulted from the failure to properly publish notice of the original proceedings in the first instance.

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IV.

The city's argument that this court will accept and follow the construction placed upon the city charter of Kansas City by the State Supreme Court (City's Brief, p. 15, *et seq.;* p. 35 *et seq.*) overlooks the fact that such construction deprived the plaintiffs in error of rights guaranteed to them under the Federal Constitution.

(*a*) The construction of the city charter by the State Supreme Court takes away from the plaintiffs in error certain *rights* absolutely granted them by the city charter. Among the rights so granted are (1) the *right* in an original proceeding to be heard on the amount of damages to be awarded, (2) the *right* of appeal from the award of damages, as well as the assessment of benefits, (3) the *right* to a lawfully published notice as to the proceedings for awarding damages, as well as assessing benefits, and (4) the right to a hearing upon the question of apportionment and to have the same ratio used in assessing the benefits throughout the entire district.

It is no answer, as heretofore stated, to say that the city charter *could* have lawfully provided for separate hearings on the award of damages for property taken, and the assessment of benefits, without giving the property-owner in the benefit district the right to a hearing on the award of damages, or the right of appeal from such award, or the right to a notice of such proceedings. Whether it *could* have so provided or not, *it did not do so.* Those *rights* were distinctly *granted* by the city charter. They are valuable rights and cannot be arbitrarily taken away.

The State Supreme Court, as pointed out in the original brief, has held that these charter provisions gave rise to but one proceeding, that there was but *one cause* to be heard by

one jury, and that there could be but *one verdict* and *one judgment.*

State *ex rel.* Holden *vs.* Gill, 84 Mo., 248.
Kansas City *vs.* Mulkey, 176 Mo. l. c., 247.
Kansas City *vs.* Hennegan, 152 Fed., 249.

Regardless of these decisions, that was and is the plain meaning of the charter. There is no ambiguity and no room for construction. The decision of the State Supreme Court in this case is simply an arbitrary departure from the plain provisions of the charter, and is clearly contrary to its former decisions.

See—

City of Kansas *vs.* Hill, 80 Mo., *supra.*

The plaintiffs in error and other parties in the benefit district were entitled to rely and insist upon the rights above referred to, given them not only by the plain provisions of the charter, but by the decisions construing those charter provisions. The decision of the State Supreme Court in this case therefore is more than the mere construction of a local statute. The effect of it is to arbitrarily take away from the plaintiffs in error and other property-owners in the benefit district valuable rights, which were clearly granted them, and in the case of the Union Depot, Bridge and Terminal Company it appears that property was acquired by it during the time that those rights were plainly in existence.

This construction of the charter amounted to the unlawful taking of property, and was an impairment of contractual rights as well.

Muhlker *vs.* Harlem R. R. Co., 197 U. S., 544.

In that case this court said:

> "When the plaintiff acquired his title those cases were the law of New York, and assured to him that

his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation. And this is the ground of our decision. We are not called upon to discuss the power of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of State decisions the first in time may constitute the obligation of the contract and the measure of rights under it."

(*b*) The construction of the city charter by the Supreme Court of Missouri, discriminates between the different property-owners in the benefit district, giving some of them greater rights than others. The effect of the decision in this case is, and the city contends, that where no valid notice is given in the original proceedings, if the property-owners whose property is to be taken and a *part* of the property-owners in the benefit district come in and accept the assessments notwithstanding such invalid notice, the proceedings may ripen into judgment as to those who come in, and the remaining property-owners in the benefit district who did not come in voluntarily are bound by such acceptance and may be assessed in a supplemental proceeding. The result is that the property-owners in the benefit district who become parties voluntarily are given the right to be heard on the question of the award of damages and have the right of appeal from such award, while the property-owners who are not legally notified may be assessed in supplemental proceedings and be cut off from such right to be heard and be deprived of that right of appeal which is given a party in the original proceeding and property-owners in supplemental proceedings are to that extent unlawfully discriminated against. Thus one class of taxpayers in the benefit district are favored over another.

It would certainly be unlawful if the city charter *provided* that a part of the taxpayers in the benefit district should have rights not given other property-owners in the same class, and that is the effect of the construction placed upon the charter by the Supreme Court in this case, and such construction therefore invades the Federal rights of these plaintiffs in error in that respect also.

(*c*) The construction of the city charter by the Supreme Court of Missouri denies to the plaintiffs in error the right to a hearing as to the apportionment of the benefits over the entire benefit district. In the first proceeding under the original ordinance, damages were awarded to the extent of about $166,000. Benefits were assessed over the entire district, but since no legal notice was given, these plaintiffs in error had no hearing as to the apportionment of these benefits. Nevertheless about $90,000 in benefits were paid, although illegally assessed. The remaining $76,000 was attempted to be assessed over the remaining part of the benefit district in the supplemental proceedings. Plaintiffs in error offered to show that the apportionment as between those who had paid and those who were assessed in supplemental proceedings was unequal, but were denied the right to show this (Record, bottom of page 136, top of page 137). The plaintiffs in error contend that they were assessed for amounts greatly in excess of any benefits that could possibly have been realized by them. This record shows the benefit district included the very heart of the business district of Kansas City, and that there were some 13,000 property-owners in this district. Yet these plaintiffs in error were assessed almost one-fifth of the entire amount awarded as damages. They had the right to have the benefits assessed in the same ratio over the entire benefit district. For instance, if those who voluntarily paid pursuant to the illegal assessment of the first jury were each assessed one-tenth of the total benefits received by them, and those who were assessed in the supple-

mental proceedings were each assessed the full value of the benefits received by them, there would be an unlawful discrimination and an unlawful taking of property in that the proportional assessments as to a part of the property-owners in the benefit district would be ten times greater than as to the remaining tax-payers. Clearly it would have been unlawful for the ordinance in the first instance to have provided for dividing the benefit district to be assessed for an improvement into two or three or a dozen subdivisions, and having the assessment made upon each subdivision by a separate jury without taking into consideration any apportionment as between the different subdivisions, but the result of the decision of the Supreme Court of Missouri in this case is to permit this. The property-owner in the benefit district cannot lawfully be assessed for more than the benefits received, and neither can he be assessed a greater proportional amount than that assessed against his neighbor. The decision of the Supreme Court of Missouri totally ignores this right.

In the case of Goodrich *vs.* Detroit, 184 U. S., 432, relied upon by defendant in error, this court recognizes that the property-owner has the right to a hearing—

> "at some stage of the proceedings upon the question what *proportion* of the tax shall be assessed upon his **land, * * *"**

Likewise in the case of Spencer *vs.* Merchant, 125 U. S., 345, this court recognized that the property-owners to be assessed have the right to be heard—

> **"upon the** validity of the assessment, and its *apportionment* among the different parcels of the class which the legislature has conclusively determined to be benefited."

The decision of the Supreme Court of Missouri in this case absolutely denied to plaintiffs in error the right to a hearing on the question of apportionment, and thus permit-

ted the city to do indirectly what it obviously could *not* have done directly.

In this case the plaintiffs in error are only thirteen out of 13,000 property-owners in the entire benefit district, and out of 5,000 property-owners assessed in the supplemental proceedings. Notwithstanding this great disparity in numbers, plaintiffs in error were assessed over $30,000 for benefits, about one-fifth of the entire cost of the improvement, and almost one-half of the amount assessed against the 5,000 property-owners in the supplemental proceedings. These figures alone are sufficient to indicate the importance to plaintiffs in error of a hearing on the matter of apportionment and the great injustice done them by the denial of this right.

(*d*) The construction of the city charter by the State Supreme Court deprives the plaintiffs in error of the right to have a valid and legal proceeding as the basis for an assessment. It is conceded that the notice of the original proceedings was insufficiently published. The charter makes the lawful publication of this notice jurisdictional. It provides:

> "But no notice of said proceeding shall, in any case, be necessary to the *validity* thereof, *except the publication of the order as herein provided.*"

Clearly, without the publication of the order "*as herein provided,*" the proceedings were *invalid.* The entry of appearance by the parties whose property was taken in the original proceedings, and the voluntary acceptance of the assessments by a part of the property-owners in the benefit district, could not make the proceedings *valid.* The notice, as pointed out in the original brief, both by the charter provisions and by the Supreme Court decisions was and is jurisdictional. The award of damages and payment of part of the benefits under the original proceedings amounted to no more than an extra-judicial agreement between the

parties which could not be binding upon the plaintiffs in error and could not be the basis for supplemental proceedings.

The legislative or charter provisions which are the basis of taxation must be strictly complied with, but if the ruling of the State Supreme Court in this case be correct they can be completely ignored by *agreement* between the city and the property-owners whose property is taken and a *part* of the property-owners to be assessed, and the remaining property-owners would be bound absolutely by such an agreement, and would have to submit to being taxed for any exorbitant allowance that might be agreed upon for the property taken, and would have to pay whatever balance was left after payment by those in the benefit district of any insignificant sum that they might have agreed upon. This is clearly a denial of equal protection of the law and the taking of property without due process.

We again respectfully submit that the judgment of the Supreme Court of Missouri should be reversed.

I. N. WATSON,
EDWARD WHITE,
H. M. LANGWORTHY,
KENNETH McC. DE WEESE,
Attorneys for Plaintiffs in Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 261.

ST. LOUIS AND KANSAS CITY LAND COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *et al., Plaintiffs in Error,*

vs.

KANSAS CITY, *Defendant in Error.*

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

ANDREW F. EVANS,
JESSE C. PETHERBRIDGE,
ARTHUR F. SMITH,
Attorneys for Defendant in Error.

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vs.

KANSAS CITY, *Defendant in Error.*

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

I.

Exact Uniformity of Assessment is Not Required by the Federal Constitution.

Plaintiffs in error contend that under the Kansas City charter of 1908 any person affected by the verdict in a condemnation proceeding in the municipal

court of Kansas City has a right to appeal from that verdict to the Circuit Court and thereby procure a trial *de novo* of all issues; and that the result of this is to give to a party to an *original* proceeding a right which is not possessed by a party to a *supplemental* proceeding.

Under the decision of the Missouri Supreme Court in the Tuller case (246 Mo., 568), we doubt whether a party assessed with benefits in a condemnation proceeding in the Municipal Court can take up the condemnation branch of the proceeding, on appeal. But whether he can or not is immaterial If the parties in the original proceeding and the parties in the supplemental proceeding are each given their opportunity to try out, before the same kind of a court and before the same kind of a jury, the question of whether their properties have been benefited, and if so, how much they should be assessed on that account, no provision of the Federal Constitution has been violated.

In addition to the authorities cited by us in our principal brief, we wish to call the Court's attention to the case of Winona & St. Peter Land Company vs. Minnesota, 159 U. S., 526, 538. That was a case where the statutes of Minnesota provided for assessing lands for back taxes. There were two methods of assessment, one where taxes were assessed each year in the ordinary way, and one where lands were assessed for back taxes when they had escaped taxation in former years. The plaintiff in error, whose land was assessed with back taxes, contended that because it was not allowed, under the statute, the same

right of appeal and protest as those who were assessed in the ordinary way, it was deprived of its property without due process of law, in violation of the 14th amendment of the Constitution. This Court upon that point, speaking through Mr. Justice Brewer, said:

> "With respect to the next inquiry, it is true there is a difference in the mode of assessment. Section 113" (the law under attack) "authorized the County Auditor to make the assessment, while as to property generally the assessment is made by the County Assessor. The latter also acts upon actual view, while there is in Section 113 no such direction to the County Auditor. The assessment made by the assessor comes before a town board of review, and subsequently before a county board of equalization. Neither of these provisions is found in Section 113. So that the difference between the two modes of assessment may be stated thus: In the one case there is an assessment by one officer, with the right to review his action; in the other, there is an assessment by a different officer, and no provision for a review except as the matter comes before the court in the proceedings for the collection of taxes. But there is nothing in this difference to affect the constitutional rights of a party."

The Supreme Court of Minnesota sustained the law imposing the tax and this Court affirmed the decision of the State court in that matter.

II.

There is no Constitutional Requirement that Where Several Tracts of Ground Are Being Condemned, All of the Issues, as Affecting All of These Tracts, Must be Tried in One Proceeding.

In addition to the authorities cited in our principal brief we wish to add the following:

Union Pacific Railroad Company vs. City of Kansas, 115 U. S. 1, 17, *et seq.*, was a condemnation proceeding under a former charter of Kansas City. It was held by this Court that the issue in that proceeding so far as the Railroad Company was concerned, was separable from the issues of other property owners, and that the company was entitled to a removal of its part of the proceeding, leaving the balance to be tried in the State Court. (This decision was made before the State Court had ruled on the subject.)

In St. Louis vs. Lanigan, 97 Mo., 175, it was held that a judgment in a condemnation case need not be reversed *in toto* because of an error committed which affected only a part of the defendants.

It is a matter of development in the Missouri practice that while a material error affecting only one party formerly required a reversal of the whole case, in ordinary cases, verdicts are now affirmed as to one defendant, and the cause remanded for a new trial as to another, the first, or correct, verdict being held in suspense until the judgment is final as to all parties. (Cox vs. Bright, 65 Mo. App., 417; Neenan vs. St. Joseph, 126 Mo., 89; Wiggins vs. St. Louis, 135 Mo., 538.)

III.

A Condemnation Proceeding is a Proceeding in rem.

It is our belief that no federal question is aised in this case, so far as the Union Depot Bridge Terminal Railroad Company is concerned, and hat for the reasons stated by the Missouri Supreme Court, and in our principal brief in this Court, the udgment against that company should be affirmed. n addition to those reasons we wish to call attention o the Missouri rule that a condemnation proceeding s a proceeding *in rem* (St. Louis vs. Koch, 169 Mo., 87, 591), and therefore we contend that the Company's payment of the assessment against one tract f ground owned by it does not constitute a ratification by it of the verdict as to any other tract of round in which it is interested.

Respectfully submitted,

ANDREW F. EVANS,

JESSE C. PETHERBRIDGE,

ARTHUR F. SMITH,

Attorneys for Defendant in Error.

ST. LOUIS AND KANSAS CITY LAND COMPANY *v.* KANSAS CITY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 261. Argued March 7, 1916.—Decided June 5, 1916.

The extent of the authority conferred upon a city by its charter, the construction of such charter, and the validity, scope and effect of ordinances adopted by the city and of proceedings thereunder and the rights of parties thereto under state law, are matters of state law as to which the decision of the state court is controlling.

A ruling as to the effect, with respect to supplemental proceeding, of the decree in a court of the same State holding a prior assessment void as to certain parties for want of required notice, does not present a Federal question.

An owner of property, which may be assessed for benefits in order to pay an award for property condemned, is not entitled, under the due process provision of the Fourteenth Amendment, to be made a party to the condemnation proceeding or to be heard as to the amount of the awards; due process of law requires only those whose property is to be taken for public improvement to have prior notice.

The question under the Fourteenth Amendment is one of state power and not of state policy; of what the State must accord—not what it may grant or withhold in its discretion.

Differences due to voluntary action and diverse individual choice may arise under equal laws and not amount to denial of equal protection of the law within the meaning of the Fourteenth Amendment.

While all taxes and assessments are necessarily laid by some rule of apportionment, and a scheme of distribution which is palpably arbitrary and constitutes a plain abuse may be condemned as violating the Fourteenth Amendment, the mere fact that there may be inequalities is not enough to invalidate the action of a State.

Where assessments are made by a political subdivision according to special benefits, the property owner is entitled to be heard as to the amount of his assessment and all matters properly entering into that determination, but he is not entitled to be heard not only as to the assessment on his property but also as to the assessments on all other property owners.

Where a state statute provides for a supplemental proceeding to correct errors in an assessment proceeding, nothing in the Federal Constitution prevents the inclusion in the supplemental proceeding of properties omitted from the original proceeding.

The Seventh Amendment has no application to an assessment or condemnation proceeding in a state court.

260 Missouri, 395, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of proceedings for condemnation of land for a street widening and assessments for benefits in Kansas City, Missouri, are stated in the opinion.

Mr. I. N. Watson, *Mr. Kenneth Mc C. DeWeese* and *Mr. H. M. Langworthy*, with whom *Mr. Edward White*, and *Mr. E. M. Jones* were on the brief, for plaintiffs in error.

Mr. Jesse C. Petherbridge and *Mr. Arthur F. Smith*, with whom *Mr. Andrew F. Evans* was on the brief, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This was a supplemental proceeding to assess certain parcels of land in Kansas City, Missouri, for benefits. The assessments were for the purpose of meeting an unpaid portion of damages which had been awarded for property condemned in widening Sixth street. Judgment for the assessments was entered on the verdict of a jury and was affirmed by the Supreme Court of Missouri, *in banc.* 260 Missouri, 395. This writ of error is prosecuted by owners of property thus assessed.

In October, 1909, the Common Council of Kansas City passed an ordinance providing for the condemnation of property within specified limits and for the raising of the amount of the award by special assessments against property within a described benefit district in accordance with Article 6 of the City's charter. Proceedings ac-

cordingly were then brought in the Municipal Court of Kansas City resulting in an award of $166,299.57 for property taken and in the making of assessments of like amount for benefits. There were over 13,000 different tracts within the benefit district. No appeal was taken from the judgment. The City collected on the assessments about $89,000. It was discovered that the publication of the required notice of the proceeding was defective and in an appropriate suit in equity, brought by the Union Pacific Railroad Company, a decree was obtained in favor of that company, and of certain intervenors, annulling the assessments against their properties; and no appeal was taken from that decree.

Thereupon, Kansas City attempted to repeal the original ordinance, presumably—as the state court suggests—for the purpose of abandoning the proceeding and returning the assessments paid. At the suit of owners of the land condemned—who were entitled to the awards—decree was entered enjoining the City from abandoning the condemnation proceedings. The City then enacted a 'supplemental or curative ordinance' basing its action on the authority of § 23[1] of Article 6 of the City's charter.

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[1] Section 23 is as follows:

"SECTION 23. Defective Proceedings—Supplemental. When by reason of any error, defect, or omission in any proceedings, or in the verdict or judgment therein that may be instituted under the provisions of this Article, a portion of the private property sought to be taken, or some interest therein, cannot be acquired, or an assessment is made against private property which cannot be enforced or collected, or when, by reason of any such defect, private property in the benefit district is omitted, the city may, by ordinance, institute, carry on and maintain supplemental proceedings to acquire the right and title to such property or interest therein intended to be taken by the first proceeding, but which cannot on account of such defect, error or omission, be acquired thereunder, or to properly assess against any piece or parcel of private property against which an assessment was in the first proceeding erroneously made or omitted to be made, the proper

"The object of said sensible charter provision," it is said by the state court, "was to afford a remedy when by any error, defect or omission in condemnation proceedings, assessments made against private property cannot be enforced or collected or where property in the benefit district is omitted, etc. In such case it was provided that the city may by ordinance institute and carry on supplemental proceedings to make a proper assessment against any parcel of property in the benefit district erroneously omitted or erroneously made in the first proceeding, etc." 260 Missouri, p. 406.

Under this ordinance the supplemental proceeding was instituted in the Municipal Court. The notice required by the charter was given and the plaintiffs in error (with the exception of the Union Depot Bridge & Terminal Railroad Company) appeared. The jury returned a verdict which was "the same as to the amount of benefits as the verdict returned in the original proceeding." *State ex rel. Graham* v. *Seehorn*, 246 Missouri, 541, 552; see 260 Missouri, p. 406. An appeal was taken from the judgment to the Circuit Court of Jackson County. While

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amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement to be determined by the verdict of the jury in such supplemental proceedings; and the original assessments may be revived, corrected, increased or diminished as may be necessary or equitable under the provisions of this Article for the original proceedings. Such supplemental proceedings shall be instituted and conducted as to the particular piece or pieces of private property sought to be acquired or assessed in like manner and with like effect as in the original proceedings, and shall be known and described as supplemental proceedings for the purposes specified in the original ordinance; and a supplemental verdict and assessment shall be made, confirmed and copies of the original verdict certified in every particular as in the original proceedings; and the assessments as established and corrected by such supplemental verdict shall be collected by the City Treasurer in the same manner and under like conditions and restrictions, powers and duties as in the case of original proceedings."

the case was pending in that court, the presiding judge having announced that he purposed to "try out the question of the amount of damages awarded to property owners whose property was taken or damaged under the original proceeding as well as the question of assessing benefits over non-paying properties within the benefit district," two prohibition suits were brought in the Supreme Court of the State. The one was brought by owners of property in the benefit district who contended that the Municipal Court had no jurisdiction of either the original or the supplemental proceedings, and hence that the Circuit Court had no jurisdiction on appeal. This contention was overruled and the writ denied. *State ex rel. Graham* v. *Seehorn, supra;* see 260 Missouri, p. 407. The other prohibition suit was brought by the owners of property which was sought to be taken for public use. They urged that there was no provision for an appeal in a supplemental proceeding begun in the Municipal Court, and that, in any event, the Circuit Court had no jurisdiction to award damages. The court sustained the right of appeal, but it was held that the verdict and judgment in the original proceedings were valid "as to those who appeared and accepted them"; that the original proceedings, unappealed from, became *res judicata.* The jury were not to include in their verdict "assessments of benefits and damages upon property properly included in the first verdict." In answer to the contention that property owners in the benefit district were entitled to be heard on the question of the amount to be paid for the property taken in condemnation, the court ruled that, while it was entirely proper as a matter of grace to permit such owners to aid the city in preventing an unduly high valuation of the property condemned, they were not necessary parties in the determination of that issue and that this question was not open to retrial in the supplemental proceedings where the owners of the property condemned

had acquiesced in the awards. Accordingly, a writ issued prohibiting the Circuit Court from retrying the question of the amount of damages awarded to the owners of property condemned. *State ex rel. Tuller* v. *Seehorn*, 246 Missouri, 568; see 260 Missouri, 407–409.

The Circuit Court then resumed the trial of the appeal in the supplemental proceeding. The plaintiffs in error appearing (with the exception of the Union Depot Bridge Company) challenged the validity of the proceedings under the state law and each company also claimed protection under the due process and equal protection clauses of the Fourteenth Amendment from any assessment of benefits until it had "opportunity to be heard upon the amount of damages that shall be awarded to property owners and the benefits assessed against it as provided by the charter of Kansas City in the original proceedings" and that it was entitled to notice of those proceedings. The right to retry the amount of the award in condemnation was frequently reiterated during the progress of the cause and denied. It was also unsuccessfully contended that the decree in favor of the Union Pacific Railroad Company, and intervenors, annulling the former assessments as to them was a bar. The court further ruled, over exceptions, that under the decision of the Supreme Court the jury was concluded from changing the assessments on the property of those owners who had paid under the original proceedings; and a general offer of testimony assailing such assessments was rejected. It appeared that, after deducting from the total awards of damages for property condemned the amount which had already been paid by property owners, there remained a balance of $76,981.98. Among the instructions given to the jury (and to each of which a general exception was taken) were the following:

"This balance you may assess against the city generally, including any benefit to any property of the city

within the benefit district, and against such of the remaining private property, lots, tracts and parcels of land, exclusive of the improvements thereon, in the benefit district, as you may deem is benefited, if any, and in the proportion which you may deem the same benefited, by the opening and widening of Sixth Street, and upon which no assessments have been paid under the original proceedings."

"If the jury find and believe from the evidence that the benefits to the city at large and the special benefits to all the property within the benefit district does not equal the damages heretofore awarded for the proposed taking of property for widening 6th Street from Broadway to Bluff Street or if the jury find that the damages so awarded exceeds in amount all such benefits as would accrue from such widening of 6th Street—then the jury will so state in their verdict and will assess no benefits in these proceedings."

"The jury are instructed that in determining the special benefit, if any, to be assessed against any piece of property, they are not allowed to assess any sum against any piece of property except such sum as they may find said property is actually and specially benefited and enhanced in value, as distinguished from any general benefit such property may receive, if any, in common with other property of the city, by reason of the widening of 6th Street."

"In passing upon the issue as to whether or not the damages in this case exceed the benefits, the jury should not and must not be influenced by the fact that the damages have been determined by another jury in another proceeding. Private property must not be assessed in excess of the actual benefits accruing thereto, if any, as distinguished from the benefits accruing to the city in general."

"Upon your request for further instruction in regard

to your duties as to assessing benefits in this proceeding, you are instructed that you may not assess any benefits in this supplemental proceeding against any property in the benefit district which was adjudged in the original proceeding to have been damaged by reason of a part thereof being taken for the widening of Sixth Street from Broadway to Bluff Street."

Among the instructions refused was one (apparently asked by a party not one of the plaintiffs in error, but in whose exception the others joined) to the effect that the property owner was entitled under the Fourteenth Amendment "to introduce evidence and be heard upon the questions (a) of the cost of the improvement in question to pay which such benefits are to be assessed and (b) of what proportion of the total benefit, if any, of said improvement should be assessed against other property in the benefit district, that upon the plat of which is marked the word 'paid' as well as all other property," and that inasmuch as the alleged right had been denied the jury should not assess any benefit.

The jury rendered a verdict laying assessments upon the properties of the plaintiffs in error, and motions for a new trial were denied. The Union Depot Bridge Company was assessed with two others, jointly, and appeared and objected to the verdict. Thereupon, the court recalled the jurors and directed separate assessments which were made. The Union Depot Bridge Company asked for an instruction to the effect that a portion of its property had been assessed in the original proceeding, that the assessment had been paid, and that the remainder of the lands were then found not to be benefited and should not be assessed. This instruction was refused. This company also moved for a new trial, insisting that it was deprived of its property without due process of law and denied the equal protection of the laws in violation of the Fourteenth Amendment.

On appeal the Supreme Court of the State entered judgment of affirmance, and it is to review that judgment that this writ of error has been sued out.

The extent of the authority conferred upon the City by its charter, the construction of the various provisions of the charter, the validity, scope and effect under the state law of the ordinances adopted by the City, and the scope and effect of the original and supplemental proceedings, and the rights of the parties thereto, under the state law, are state questions as to which the decision of the state court is controlling. *Long Island Water Co.* v. *Brooklyn*, 166 U. S. 685; *Castillo* v. *McConnico*, 168 U. S. 674, 683; *King* v. *Portland*, 184 U. S. 61; *Willoughby* v. *Chicago*, 235 U. S. 45. So, the ruling as to the effect, with respect to the supplemental proceeding, of the decree in a court of the same State holding the prior assessments void for want of the required notice, as to the complainant in that suit and certain intervenors, does not present a Federal question. *Phœnix Ins. Co.* v. *Tennessee*, 161 U. S. 174, 185.

It is also well settled that an owner of property which may be assessed for benefits in order to pay an award for property condemned, is not entitled by virtue of the Fourteenth Amendment to insist upon being made a party to the condemnation proceeding or to be heard with respect to the amount of the award. He may not demand, as a Federal right, that the power of eminent domain shall not be exercised save upon notice to him. *Voigt* v. *Detroit*, 184 U. S. 115, 122; *Goodrich* v. *Detroit*, 184 U. S. 432, 437, 438; *Londoner* v. *Denver*, 210 U. S. 373, 378. As well might it be argued, as was suggested in *Goodrich* v. *Detroit*, *supra*, that whenever the city contemplated a public improvement of any description, it would be necessary to give notice to all those who might be taxed to pay for it. The established rule is "that it is only those whose property is proposed to be taken for a public improvement

that due process of law requires shall have prior notice." (*Id.*)

Nor is there ground for a distinction because the charter of Kansas City provided a single proceeding, embracing both the proposed condemnation and assessment for benefits, and required notice to the property owners within the benefit district. The question under the Fourteenth Amendment is one of state power, not of state policy; of what the State must accord, not of what it may grant or withhold in its discretion. *Castillo* v. *McConnico, supra; Willoughby* v. *Chicago, supra.* With respect to neither proceeding, original or supplementary, was it essential to due process of law in making assessments that the assessed owners should be heard on the amount of the awards in condemnation. Nor was there a denial of the equal protection of the laws because in the original proceeding there was such an opportunity, together with a right of appeal. The asserted inequality sprang solely from the fact that certain assessed owners, despite the defective publication of notice, appeared and acquiesced in the proceedings. There is no ground for the charge of a denial of equal protection because some owners were willing to waive defects in procedure and others were not. Differences due to voluntary action and diverse individual choices constantly arise under equal laws. We conclude that the contention based on the refusal to reopen the case as to the damages awarded is wholly without merit.

With respect to the amount of the assessments to pay these damages, it is apparent that the question presented relates solely to the right to insist upon a re-determination of the assessments laid upon the properties of other owners, which those owners had accepted and paid. Under the rulings of the court, none of the plaintiffs in error were assessable except for benefits actually and specially accruing to their respective properties; they were heard as

to these benefits and as to the amount of their own assessments. Their objection, as to the matter of apportionment, struck at the finality of the other assessments. In the only instance in which it could be said that any right under the Federal Constitution was specially and appropriately set up as to apportionment it was urged that these owners were entitled to be heard upon "what proportion of the total benefit, if any, of said improvement should be assessed against other property in the benefit district, that upon the plat of which is marked the word 'paid' as well as all other property"; and because this was not allowed, and the assessments which had been acquiesced in and paid by other owners were held to be final, a peremptory instruction was asked that the jury should assess no benefits. It is apparent that this objection goes directly to the validity of the supplemental proceeding as such and denies the power of the State to authorize it. It means that the only proceeding that could constitutionally be taken in such a case would be to have a trial *de novo* as to all the assessments; and thus, where as in this instance thousands of tracts are involved, if a defect is found in the publication of the notice in the original proceeding and a property owner challenges his assessment upon that ground, it would not be sufficient to give him a hearing as to the amount of his own assessment but he could demand as a constitutional right a re-determination of the assessments of all others.

This contention is inadmissible. It is true that all taxes and assessments are laid by some rule of apportionment. Where the scheme of distribution is palpably arbitrary and constitutes a plain abuse it may be condemned as violative of the fundamental conceptions of justice embodied in the Fourteenth Amendment. The principles involved in such cases have recently been discussed and need not be restated. *Wagner* v. *Baltimore*, 239 U. S. 207; *Houck* v. *Little River District*, 239 U. S. 254, 265;

Myles Salt Co. v. *Commissioners*, 239 U. S. 478, 485; *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55, 58, 59; *Embree* v. *Kansas City Road District*, 240 U. S. 242, 250, 251. But the mere fact that there may be inequalities is not enough to invalidate state action. *Davidson* v. *New Orleans*, 96 U. S. 97, 105; *Walston* v. *Nevin*, 128 U. S. 578, 582; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 176, 177; *Houck* v. *Little River District*, *supra*. Where assessments are made by a political subdivision, a taxing board, or court, according to special benefits, the property owner is entitled to be heard as to the amount of his assessment and upon all questions properly entering into that determination. "If the legislature," as has frequently been stated, "provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." *Spencer* v. *Merchant*, 125 U. S. 345, 355, 356; *Paulsen* v. *Portland*, 149 U. S. 30, 41; *Baumon* v. *Ross*, 167 U. S. 548, 590; *Goodrich* v. *Detroit*, *supra*. What is meant by his "proportion of the tax" is the amount which he should be required to pay or with which his land should be charged. As was said in *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. p. 175, when it is found that the land of an owner has been duly included within a benefit district "the right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, *i. e.*, the amount of the tax which he is to pay." See, also, *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 341. It is a very different thing to say that an owner may demand as a constitutional privilege, not simply an inquiry as to the amount of the assessment with which his own property should rightly be charged in the light of all relevant facts, but that he should not be assessed at all unless the assessments of other owners who have paid without

question and are not complaining shall be re-opened and re-determined. The Fourteenth Amendment affords no basis for a demand of that sort.

The separate contention of the Union Depot Bridge Company is, as the state court said, virtually one of *res judicata*. It was insisted that as a portion of its property was assessed in the original proceeding, and the assessment had been paid, it could not be assessed on other portions in the supplemental proceeding; that it must be concluded that the jury in the original proceeding had found that the other tracts were not benefited. The question whether the first judgment had this effect was a matter of state law; there is nothing in the Federal Constitution to prevent the assessment in the supplemental proceedings of properties omitted from the first proceeding. *Phœnix Insurance Co.* v. *Tennessee*, *supra*. The Seventh Amendment, invoked in this connection, has no application. *Minneapolis & St. Louis R. R.* v. *Bombolis*, decided May 22, 1916, *ante*, p. 211. The company appeared in the supplemental proceeding and was heard, and so far as any Federal question is concerned, does not appear to be in a different case from that of the other property owners.

We find no error in the decision of the Federal questions and the judgment is affirmed.

Judgment affirmed.